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MASON ON HIGHWAYS

CONTAINING THE

NEW YORK HIGHWAY LAW

AND

ALL CONSTITUTIONAL AND GENERAL STATUTORY PROVISIONS RELATING TO HIGHWAYS; HIGHWAY OFFICERS, THEIR POWERS AND DUTIES,

INCLUDING

The Good Roads Law of 1898 and 1901

ALL

AS AMENDED TO THE SESSION OF 1903

WITH

ANNOTATIONS AND FORMS

BY HERBERT DELAVAN MASON
OF THE NEW YORK CITY BAR

BANKS & COMPANY
ALBANY, N. Y.
1902

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BY

HERBERT D. MASON

PREFACE.

The form which this work has assumed readily suggests the purposes with which it is written: First, to furnish an annotated edition of the Highway Law of the State of New York, as enacted by the Legislature of 1890, in chapter 19 of the General Laws, and as amended to the close of the session of 1902; second, to bring together in one volume all the various statutes relating to highways, including not only the General Highway Law, but also all constitutional provisions and the many independent general statutes which relate to that subject; and, third, to furnish forms suitable for proceedings under these laws.

It has been sought to attain the first purpose of the work by a careful examination of all cases involving questions of highway law, including not only the recent decisions, but the older ones as well, the examination of the latter class being necessary to a larger degree than would have been conceived possible, owing to the fact that many sections of the law stand to-day, in substance, and, in many cases, in almost exact phraseology as in the Revised Statutes of 1828. This condition not only renders the inclusion of the older cases desirable, and, in the absence of later authorities, absolutely necessary, but it also leads to another result even more important to the practitioner and which would not be of such moment in the consideration of a statute of more recent origin — that is the many conflicting decisions resulting from over three-quarters of a century of interpretation of these statutes by the courts. In some instances the courts have, upon considering the older line of decisions, felt that changed conditions warranted a departure from the doctrines formerly announced; while in other instances the older decisions have been, in effect, overruled without apparent consideration by court or counsel, due, doubtless, to the belief that probable statutory changes has rendered them inappli-

cable — a view of the matter which has entailed a great amount of labor in an endeavor to reconcile the conflicting interpretations. Particular care has been taken to note these conflicts and to call attention to any reason assignable for them, if any such seems to exist.

The second purpose of the work, namely, to include all constitutional and general statutory provisions concerning highways, has been attempted by incorporating such provisions into the body of the work where it has seemed desirable, and in all other cases by including them in a section of the work immediately following the Highway Law proper. The omission of many general acts from the revision, and the enactment since the revision of many general independent acts supplementary to, and, in some instances, controlling of the General Highway Law, have rendered it impossible to rely safely upon the general law as the final expression of the legislative will. It has, therefore, been necessary to make frequent references to those acts in connection with the sections of the Highway Law with which they should be read.

Particular care has been taken in the preparation of the forms included in the work, and, in many instances, reference to appeal books in the Court of Appeals has provided a test of their sufficiency, which, it is hoped, has added much to their value.

NEW YORK CITY, *August,* 1902. H. D. M.

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THE HIGHWAY LAW.

AS AMENDED TO COMMENCEMENT OF SESSION OF 1903.

LAWS 1890, CHAPTER 568.

AN ACT in Relation to Highways, constituting Chapter Nineteen of the General Laws.

[Became a law June 7, 1890, taking effect March 1, 1891.]

CHAPTER NINETEEN OF THE GENERAL LAWS.

THE HIGHWAY LAW.

Article I. Highway officers, their general powers and duties, (§§ 1-26.)
II. Assessment for highway labor. (§§ 30-59a.)
III. The duties of overseers of highways, and the performance of highway labor. (§§ 60-74.)
IV. Laying out, altering and discontinuing highways and laying out private roads. (§§ 80-123.)
V. Bridges. (§§ 130-145.)
VI. Miscellaneous provisions. (§§ 150-169b.)
VII. The regulation of ferries. (§§ 170-174.)
VIII.*Repealing and other clauses. (§§ 180-183.)

ARTICLE I.

HIGHWAY OFFICERS, THEIR GENERAL POWERS AND DUTIES.

Section 1. Short title.
2. Treasurer of highway commissioners.
3. Powers of one commissioner.
4. General powers of commissioners.
5. Mile-stones and guide-boards.
6. Road machines and implements.

* Article VIII, renumbered Article IX and a new Article VIII, "County Supervision of Highways," inserted L. 1902, ch. 396.

Section 7. Stone-crushers and materials.
8. Custody of stone-crushers.
9. Additional tax.
10. Extraordinary repairs of highways or bridges.
11. Auditing expense thereof.
12. Accounts, how made out.
13. Unsafe toll-bridge.
14. Water pipes in highways.
15. Actions for injuries to highways.
16. Liability of towns for defective highways.
17. Action by town against commissioners.
18. Audit of damages without action.
19. Reports of commissioners.
20. General duties of overseers.
21. Opening obstructed highways.
22. Penalties against overseers.
23. Penalties, how collected.
24. Compensation of overseers.
25. Division of town into highway commissioner districts.
26. Duties of commissioner in each district.

SECTION 1. **Short title.**— This chapter shall be known as the highway law.

Provision was made by L. 1893, ch. 655, for a compilation of the Highway Law to be issued in manuals for distribution among the commissioners of highways and overseers of highways. It was also provided that the manual should contain plans for road building.

The highway law is a consolidation and revision of the prior highway legislation and contains some new provisions engrafted upon the antecedent law. People ex rel. Root v. Bd. Supervisors, 146 N. Y., 107.

Highways in Indian reservations are not within this law. Bishop v. Barton, 2 Hun, 436; affd., 64 N. Y., 637; and see Indian Law (L. 1892, ch. 679), §§ 12, 73, 80, 94.

The Constitution of the State of New York provides in art. 3, § 18, "The Legislature shall not pass a private or local bill in any of the following cases:

* * * * * * *

"Laying out, opening, altering, working or discontinuing roads, highways or alleys, or for draining swamps or other low lands."

But it may authorize boards of supervisors to do so. People ex rel. Morrill v. Supervisors, 112 N. Y., 585.

As to what is a private or local bill, see Matter of Henneberger, 155 N. Y., 420.

Powers of boards of supervisors over highways and bridges, §§ 54-59a, 180-189, *post;* County Law, §§ 60-80, pages 169-178, *post;* L. 1898, ch. 115, pages 189-196, *post.*

Highways in villages and village trustees as commissioners of highways, Village Law (L. 1897, ch. 414), §§ 140-169; L. 1883, ch. 113.

Turnpike, plank-road and bridge corporations. Trans. Corp. L. (L. 1890, ch. 566), §§ 120-151.

Rights and duties of railroad companies and street railroad companies, as to highways, and as to each other in highways. Railroad Law (L. 1890, ch. 565); L. 1893, ch. 239; L. 1835, ch. 300.

Alteration of roads, construction of bridges, etc., under Canal Law (L. 1894, ch. 338), §§ 110-118.

Special provisions for improvement of streets and highways in towns lying within counties containing upwards of 600,000 inhabitants, L. 1893, ch. 582.

Rivers and streams as highways, Navigation Law (L. 1897, ch. 592), §§ 70-76b.

Special provisions for lamp and lighting districts, L. 1892, ch. 255, as amd. by L. 1893, ch. 79 and L. 1896, ch. 309.

Act to preserve forever the New York and Albany post road as a State public highway, L. 1896, ch. 423.

Act to authorize the acquisition of turnpikes and plank roads by certain counties and villages, L. 1897, ch. 596; L. 1899, ch. 594.

Act in relation to the appointment of sidepath commissioners and the construction of sidepaths, L. 1899, ch. 152, as amd., L. 1900, ch. 640; L. 1902, ch. 305.

Act to provide for the improvement of public highways, L. 1898, ch. 115; L. 1901, ch. 240; pages 189-200, *post.*

§ 2. **Treasurer of highway commissioners.**— When there is more than one commissioner of highways in any town, they shall designate one of their number to be treasurer. If they fail so to do, the commissioner longest in office shall be the treasurer; and all money collected for highway purposes, or belonging to the highway fund of the town, shall be paid to him. Before receiving such money, he shall execute to the town an undertaking, to be approved by the supervisor, to the effect that he will faithfully account and pay over to any officer or person entitled thereto, any money that may come into his hands as such treasurer.

Revised from L. 1873, ch. 395, § 5, in which the official thus chosen was called the president.

The undertaking required of the treasurer by this section is in addition to the one required of all commissioners by § 63 of the Town Law, page 182, *post.*

Commutation money of corporations to be paid to commissioners of highways, § 62, *post.*

Arrearages for unperformed labor to be paid to commissioners of highways when collected, § 68, *post.*

Collector of taxes pays over to commissioners of highways money raised to repair highways and bridges of towns. Tax Law (L. 1896, ch. 908), § 56.

Money raised from licensing hacks, conveyances and amusements in towns having a population of over three thousand outside of cities or villages to be paid to commissioners of highways, L. 1890, ch. 332.

Form of designation of treasurer No. 1, *post.*

For form of undertaking required by this section, see Nos. 2-5, *post.*

§ 3. **Powers of one commissioner.**— When any town has but one commissioner of highways, the term, commissioners of highways, when used in this chapter, shall mean such one commissioner.

New, but see L. 1873, ch. 395, § 6, and L. 1881, ch. 644.

To same effect see Statutory Construction Law (L. 1892, ch. 677), §§ 8, 18.

It is provided in § 15 of the Town Law, page 180, *post*, that where there is but one commissioner of highways elected, he shall have the same powers as three commissioners would have.

For general powers of commissioners of highways, see § 4 and notes, *post.*

For provisions as to division of a town into commissioner districts, where there are three commissioners of highways, see §§ 25, 26, *post.*

§ 4. **General powers of commissioner.**— The commissioners of highways in the several towns, shall have the care and superintendence of the highways and bridges therein, except as otherwise specially provided in relation to incorporated villages, cities and other localities; and they shall

1. Cause such highways and bridges to be kept in repair, and give the necessary directions therefor, and shall inspect the highways and bridges in each highway district between the first and fifteenth day of September in each year, or at such other time as the board of supervisors by resolution may prescribe. If it appears to him upon such inspection that the labor assessed in any highway district has not been entirely performed therein,

he shall transmit a statement to the supervisor of his town containing the number of days' labor which in his opinion have not been performed in such district, and a list of all persons and corporations owning property therein, and the number of days of labor still to be performed by such persons and corporations. A notice of the transmission of such statement and of the day and place where the persons assessed for highway labor in such district may be heard before such supervisor, shall be posted in at least three conspicuous places in the road district affected by such statement. On the day and at the place specified in such notice, the supervisor shall hear all persons interested in the performance of labor on the highways in such district. After such hearing, the supervisor shall correct such list in accordance with the testimony and facts as they appear to him and shall make a return thereof to the board of supervisors in the same manner as unpaid taxes and unperformed labor are returned by the town board to the board of supervisors. The board of supervisors at its annual meeting in each year, shall cause the amount of the arrearages for highway labor contained in such lists, estimating each day's labor at one dollar and fifty cents a day, to be collected from the property of the person or corporation specified in such list, in the same manner as arrearages for unperformed labor.

Revised from 1 R. S., ch. 16, tit. 1, art. 1, § 1, subds. 1, 4; amd. L. 1901, ch. 437; L. 1902, ch. 75, sec. 1, in effect March 4, 1902.

Duty of commissioners to personally superintend repairs, see subd. 9 of this section.

For provisions as to liability for injuries to highways, see §§ 15, 153, *post.*

For provisions as to liability for defects, see §§ 16-18, *post.*

For overseer's duty to keep highway in order, see § 20, *post.*

Maintaining highways on town lines, § 97, *post.*

Improvement of highways extending beyond town line, § 95, *et seq.*, *post.*

Provisions as to obstruction of and encroachment upon highways, §§ 21, 102-105, *post.*

The commissioner of highways has no jurisdiction over "county roads," § 58, *post;* see, also, art. 8, *post.*

For additional provisions for repair of bridges, see §§ 130-145 and notes, *post.*

Forms of statement and notice of transmission, Nos. 10-11, *post.*

Raising additional funds for repairs of highways, § 9, *post*, and County Law, §§ 69, 70, pages 173, 174. *post*. And see People ex rel. Wakeley v. McIntyre, 154 N. Y., 628, and Ghiglione v. Marsh, 23 App. Div., 61.

Duty of railroads as to grade crossings and overhead and subway crossings. Railroad Law (L. 1896, ch. 565), §§ 11, 60-67; L. 1835, ch. 300.

A town has never had any right to lay out, alter, discontinue, improve or repair a highway. Those are duties of the commissioner of highways, and the town has no authority over him in their performance, and he is not its agent in so doing. Snowden v. Town of Somerset, 52 App. Div., 84; rev'd, 171 N. Y., 99; Lyth & Sons v. Town of Evans, 33 Misc., 221; People ex rel Bowles v. Burrell, 14 Misc., 217.

Where commissioners of highways have not sufficient funds in their hands to provide all needed repairs, it is within their discretion to apply the funds on hand in making such repairs as are most urgently needed, and they are not, nor is the town, liable for their error in judgment in so doing, if they act reasonably and in good faith. Monk v. Town of New Utrecht, 104 N. Y., 552; Patchen v. Town of Walton, 17 App. Div., 158; Garlinghouse v. Jacobs et al., 29 N. Y., 297.

And they are presumed to have exercised their discretion reasonably and in good faith in such a case. People ex rel. Slater v. Smith, 83 Hun, 432; Garlinghouse v. Jacobs et al., *supra*.

If they do not exercise this discretion reasonably, and thereby omit essential repairs, the town will be held liable for resulting injuries. Ivory v. Town of Deerpark, 116 N. Y., 476.

But if the commissioners of highways have power to borrow money for the purpose of making repairs, their lack of funds is no excuse. Hover v. Barkhoof, 44 N. Y., 113; Ivory v. Town of Deerpark, *supra;* Whitlock v. Town of Brighton, 2 App. Div., 21; affd., 154 N. Y., 781; McMahon v. Town of Salem, 25 App. Div., 1; and see many additional cases on this subject in notes to § 16, *post*.

Commissioners of highways may repair any part of the highway; not merely the traveled portion, but to its extreme width. Anderson v. Van Tassel, 53 N. Y., 631, and see Newell v. Town of Stony Point, 59 App. Div., 237.

Where it is necessary to cut down the bed of the highway, the fee of which is not in the public, in order to bring it to a desired grade, the commissioners of highways may use the earth and stone thus taken out to repair any part of the highway upon which they may see fit to put them, but unless it is necessary to remove the earth and stone for that purpose, they may not use them for the purpose of repairing any part of the highway, except that part which is opposite the lands of the one who owned the fee of the highway at the point where the materials were removed. Robert et al. v. Sadler et al., 104 N. Y., 229; Ladd v. French, 6 N. Y. Supp., 56; 24 N. Y. S. R., 952.

The same rule has been applied to removals from village streets by street commissioners. Cotanch v. Grover, 57 Hun, 272.

As to the removal of earth from streets where the owner of the lands lays it out in lots and dedicates the streets to the public, and they are adopted by the authorities, see The Niagara Falls Suspension Bridge Co. v. Bachman, 4 Lans., 523 (judgment reversed on another ground, 66 N. Y., 261); where it is held that such removals are permissible when the material removed is applied to other streets of the same plot. This case is criticised in Robert et al. v. Sadler et al., 104 N. Y., 229, as being a case of removal necessary to bring the surface down to an established grade.

Where the soil is required to repair the road in front of an abutter's premises, it may be taken from any portion of the road, including the untraveled roadside, regardless of any grading which the abutter may have done, and though such grading will be disturbed by the removal of the soil. Anderson v. Van Tassel, 53 N. Y., 631.

Where an abutter owns the fee of a highway, a municipality may not deduct the value of earth and stones taken from the highway by the contractor from the contract price of the improvement. Fisher v. City of Rochester, 6 Lans., 225.

Such stone belongs to the abutter. Deverell v. Bauer, 41 App. Div., 53.

Trees in a highway may be removed to be used in fitting it for public use, but from analogy it would follow that they must be used as soil would be in like circumstances. Ellison v. Allen et al., 30 N. Y. Supp., 441; 62 N. Y. S. R., 274; The Niagara Falls Suspension Bridge Co. v. Bachman, *supra.*

A commissioner of highways is not protected by his office in entering upon private property and taking soil to repair highways. Duryea v. Smith et al., 42 N. Y. S. R., 565.

An abutter, who owns the fee of a highway, may remove soil from the highway, if he does not injure the highway, nor affect the freedom of egress or ingress of adjoining owners. Williams v. Kenney, 14 Barb., 629; see notes to § 15, *post.*

Authority to repair bridges may imply authority to rebuild, even by replacing a partially fallen wooden bridge with an iron bridge. People ex rel. Slater v. Smith, 83 Hun, 432.

But it would seem that commissioners of highways may not change the location of a bridge under the authority to repair or rebuild. The People v. Finger, 24 Barb., 341; and see The People v. Denslow, 1 Caines, 177; Griffen v. House, 18 Johns., 397.

Repairs may not be so made as to materially increase or change the natural flow of surface water or streams to the detriment of an abutter. Moran v. McClearns, 63 Barb., 185; Ashberry v. The Town of West Seneca, 33 N. Y. S. R., 431; 11 N. Y. Supp., 306.

And the abutter may turn back the increased flow. Thompson v. Allen, 7 Lans., 459.

And a stream which has been diverted into a highway may be returned to its natural course on the abutter's land. Kellogg v. Thompson, 66 N. Y., 88.

Commissioners of highways are not liable for failure to provide sluices or culverts to carry off surface water. Gould et al. v. Booth et al., 66 N. Y., 62; and see Barber v. Town of New Scotland, 88 Hun, 522, and Acker v. Town of New Castle, 48 Hun, 312.

A town is not liable for injuries resulting from the negligence of a commissioner of highways, or his employes, in the repair of a highway, not resulting in a defective highway, since the town itself is not required to make any such repairs, and the commissioners and overseers are not its agents in so doing. So held in a suit for injuries caused by blasting in the course of making repairs to a highway. Robinson v. Town of Fowler, 80 Hun, 101; and see Barber v. Town of New Scotland, 88 Hun, 522; Snowden v. Town of Somerset, 52 App. Div., 84; rev'd, 171 N. Y., 99.

A railroad may be indicted for failure to make the repairs to highways which it is required to make. People v. N. Y. C. & H. R. R. R. Co., 74 N. Y., 302.

Commissioners of highways do not lose all control over a highway from the fact that a plank-road company takes a portion of it for its road, but they retain their jurisdiction in the particulars in which its exercise would not conflict with the purposes or rights of the plank-road company, and so far as the rights of the public require it to be exercised, and this rule is especially applicable to the keeping down of encroachments. In consideration of the tolls received, the company relieves the public of the maintenance of the highway, but the public's right to use it for traveling remains unimpaired. Walker v. Caywood et al., 31 N. Y., 51; Estes v. Kelsey, 8 Wend., 555; Matter of Application of R. E. R. Co., 123 N. Y., 351.

And the plank-road company may not turn the exclusive use of the highway over to a railroad company. Matter of Application of R. E. R. Co., 57 Hun, 56; 123 N. Y., 351.

Village trustees, who have control of the streets of a village, may not tear up a turnpike without notice or warning, even for the purpose of changing grade. F. & S. R. R. & T. Co. v. Village of Fayetteville, 37 Misc., 223.

Where a town meeting votes funds for the repair of a certain highway, the commissioner may still use these funds for general highway purposes and are not compelled to use them for the purpose of repairing the particular highway for the repair of which they were voted. People ex rel. Penfield v. George, 38 N. Y. S. R., 345; 14 N. Y. Supp., 475;

and see Board of Supervisors v. Phipps, 28 App. Div., 521; and Board of Supervisors v. Phipps, 35 App. Div., 350.

Ordinarily, an abutter is not entitled to damages for a change of grade made in the repair of a highway. For a consideration of this entire question, see Hosmer v. City of Gloversville, 27 Misc., 669; L. 1883, ch. 113; L. 1894, ch. 172.

As to power of commissioners to erect bridges, see Huggans v. Riley, 125 N. Y., 88; Berlin Iron Bridge Co. v. Wagner, 57 Hun, 346; Mather v. Crawford, 36 Barb., 564; and §§ 10, 130-145, and notes, *post.*

The care of highways and bridges in cities and villages is generally distinct from that in towns. Matter of Certain Freeholders, 46 Hun, 620.

Fines and commutations form part of the resources with which the commissioner must perform his duties. Berlin Iron Bridge Co. v. Wagner, 57 Hun, 346.

See many additional cases under subd. 9 of this section, and under § 16, *post.*

2. Cause such highways as shall have been laid out, but not sufficiently described, and such as shall have been used for twenty years, but not recorded, to be ascertained, described and entered of record in the town clerk's office.

Revised from 1 R S., ch. 16, tit. 1, art. 1, § 1, subd. 3.

For provisions as to laying out highways generally, see §§ 80-123, *post.*

As to what are highways by use, see section 100 and notes, *post.*

For form of description under this section, see No. 12, *post.*

Where an unauthorized order has been made purporting to lay out and describe an ancient highway, the proper relief is for an aggrieved party to sue for a cancellation of the order as a cloud on title. Riley v. Brodie, 22 Misc., 374.

And not by an appeal from the order. Kelsey v. Burgess, 35 N. Y. S. R., 368; 12 N. Y. Supp., 169; The People v. Judges of Cortland Co., 24 Wend., 491; Wiggins v. Tallmadge, 11 Barb., 457.

The mere fact that a highway has been laid out is not sufficient to constitute a highway. There must be an existing thoroughfare suitable for travel. Beckwith et al. v. Whalen, 70 N. Y., 430.

But if there has been the requisite user of a road, it is subject to the provisions of this subdivision, regardless of any special acts governing particular towns. James v. Sammis et al., 132 N. Y., 239.

The order of the commissioners cannot extend or change the location of a highway by use beyond its width and location as shown by the user made of it. Ivory v. Town of Deerpark, 116 N. Y., 476; Snyder v. Plass, 28 N. Y., 465; James v. Sammis et al., 132 N. Y., 239; Talmage v. Huntting, 29 N. Y., 447; Cole v. Van Keuren, 4 Hun, 262; affd., 64 N. Y., 646; People v. Judges of Cortland Co., 24 Wend., 491.

For prescriptive rights are measured by the user which gives rise to them. Lewis v. New York & Harlem R. R. Co., 162 N. Y., 202, 225.

A highway described under the provisions of this subdivision may be less than the statutory width. Harlow v. Humiston, 6 Cow., 189; see § 100, *post*.

A person who takes land, described as bounded by the highway, is estopped to dispute the existence of the highway. De Witt v. Van Schoyk, 35 Hun, 103; affd. 110 N. Y., 7.

A certificate of commissioners defining a highway under this subdivision is admissible as evidence on the question of the location of the road. Ivory v. Town of Deerpark, 116 N. Y., 476.

Though it is not conclusive when not based on user or record. Kelsey v. Burgess, 35 N. Y. S. R., 368; 12 N. Y. Supp., 169; see Mogg v. West, 8 Week. Dig., 105.

And the question is for the jury when the evidence is conflicting. Cole v. Van Keuren, 4 Hun, 262: affd. 64 N. Y., 646.

Laying out a highway *to* a landing place does not authorize the laying out *of* a landing place. Commissioners, etc., of North Hempstead v. Judges, etc., of Queens, 17 Wend., 9; Fowler v. Mott, 19 Barb., 204.

That commissioners empowered to describe "old roads" cannot lay out as an old road land which has been *dedicated* to the public use. See Commissioners, etc., of North Hempstead v. Judges, etc., of Queens, 17 Wend., 9 and see § 80, *post*.

Nor can commissioners lay out as an old road a road which has been laid out by an individual on his own lands. City of Oswego v. Oswego Canal Co., 6 N. Y., 257.

3. From time to time, not oftener than once a year, divide the town into so many highway districts as they shall judge convenient, by writing, under their hands, to be filed with the town clerk, and by him to be entered in the town book, at least ten days before an annual town meeting. A territory not exceeding one square mile, containing a population of not less than one hundred and fifty, and not including a part of a city or village, may be established as a separate highway district in the following manner: A verified petition of two-thirds of the electors of such territory representing two-thirds of the taxable property therein and describing the territory, may be presented to the highway commissioner at least twenty days before the annual town meeting. The petition shall state the population of the proposed district, and the taxable persons and property as appears by the last preceding assessment roll of the town. A farm or lot shall not be divided

in the formation of such district. Within ten days after the presentation of such a petition, the highway commissioner shall establish the district in the manner above required for other highway districts. The highway district so established shall not be abolished, except upon the petition or written consent of two-thirds of the electors representing two-thirds of the taxable property of the district. The highway commissioner may extend the highway districts, so established, not more than half a mile in any direction, and if it is so extended an order shall be entered accordingly.

Revised from 1 R. S., ch. 16, tit. 1, art. 1, § 1, subd. 5; L. 1873, ch. 395, § 6; amd. L. 1897, ch. 782.

For form of order establishing highway district, see No. 13, *post.*

For form of petition for a separate highway district, see No. 14, *post.*

For form of order establishing a separate highway district, see No. 17, *post.*

For form of petition abolishing separate highway district, see No. 16, *post.*

The effect of discontinuing a road district, which has been formed from other districts, is to restore the original districts to their former bounds. The People v. Sly, 4 Hill, 593.

The object of this division into highway districts is to divide up among the overseers the highway labor that is to be performed, that the highways may more speedily receive the benefit of it. Chamberlain v. Taylor, 36 Hun, 24.

4. Assign to each of the highway districts such of the inhabitants and corporations liable to work on highways, as they shall think proper, having regard to proximity of residence as much as may be;

Revised from 1 R. S., ch. 16, tit. 1, art. 1, § 1, subd. 6, and L. 1853, ch. 63, § 1; see L. 1837, ch. 431.

For provisions as to assessment of highway labor, see §§ 30-59a, *post.*

For provisions as to performance of highway labor, see §§ 60-74, *post.*

Form of assignment of highway labor, see No. 13, *post.*

The commissioners have power over all the highway labor in the town, but they must regard proximity of residence as much as may be in assigning it. They act upon their own judgment and discretion in laying out road districts. Buffalo Plank Road Co. v. Commissioners of Highways, etc., 10 How. Pr., 237.

5. On the fifteenth day of April of each year, make and file with the town clerk, a written appointment of a resident of each

district, to be overseer of highways therein. The town clerk shall notify each overseer of his appointment, within ten days after the filing thereof, and the person so appointed and notified, shall thereupon become and be the overseer of highways within his district for one year, and until his successor shall be appointed. If any person so appointed overseer, shall refuse to serve or his office shall become vacant, the commissioner shall in like manner appoint some other person to be overseer. The board of supervisors of any county may, by resolution, adopted at an annual meeting of such board, fix another time when the appointment of such overseers of highways shall be made in that county.

Revised from L. 1865, ch. 522, § 7; L. 1868, ch. 791, § 1; L. 1880, ch. 503, § 1, and 1 R. S., ch. 16, tit. 1, art. 1, § 14; amd. L. 1900, ch. 399; L. 1901, ch. 125.

A person refusing to serve as overseer when appointed is liable to a penalty of ten dollars. Town Law, § 55, page 182, *post.*

Acceptance of assessment list of highway labor is acceptance of office of overseer, § 34, *post.*

For general duties, liabilities and compensation of overseers, see §§ 20-24, *post.*

For form of appointment of overseers as required by this subdivision, see No. 18, *post.*

For form of appointment to fill vacancy in the office of overseer, see No. 19, *post.*

Under the former statute a commissioner of highways was required within one week after the annual town meeting, to appoint as many overseers of highways as there were road districts in the town. People ex rel. Myers v. Barnes et al., 114 N. Y., 317.

6. Require overseers of highways to warn all persons and corporations assessed to work on highways, to come and work thereon, with such teams and implements, and at such times as the said commissioners, or any one of them shall direct;

Revised from 1 R. S., ch. 16, tit. 1, art. 1, § 1, subd. 7.

For provisions as to giving notice to work, see §§ 60-61, *post.*

For general provisions as to performance of highway labor, see §§ 60-74, *post.*

7. Expend all moneys raised and collected from the town at large for highway purposes, upon the highways and bridges situated in, or upon the borders of the town, or highway districts

assigned to the town in which such moneys were raised and collected, in such proportion as they may deem just and proper;

Revised from L. 1878, ch. 377, § 2; see L. 1873, ch. 395, § 8.

See cases under subd. 1 of this section, *ante*, and § 16, *post*, as to the discretion of commissioners of highways in the application of funds when they are insufficient to make all needed repairs.

Payment of highway moneys to commissioners, § 2 and notes, *ante*.

The fact that a town meeting has, at the time it voted money for repairs, specified certain roads upon which the money in question shall be expended, does not prevent the commissioners of highways using it for general highway purposes. People ex rel. Penfield v. George, 38 N. Y. S. R., 345; and see Board of Supervisors v. Phipps, 28 App. Div., 521; Board of Supervisors v. Phipps, 35 App. Div., 350.

8. Have power to enter upon the lands of any person adjoining any of the rivers, streams or creeks of the state, drive spiles, throw up embankments and perform such other labor as may be necessary upon the banks of such rivers, streams, or creeks for the purpose of keeping them or any of them within their proper channels and preventing their encroachment upon any of the highways of the state, also to enter upon any lands adjoining any highway, and which lands during the spring freshets or any time of high water are subject to overflow from such rivers, streams or creeks, and to remove or change the position of any fence or other obstruction which prevents the free flow of water under or through any highway, bridge or culvert, whenever the same may be necessary for the protection of any highway, and to protect such highways and the property of the town from damages by reason of such rivers, streams or creeks washing away their embankments, or changing the location of the channels, and to agree with the owner of any such lands upon the amount of damages, if any, sustained by him in consequence of such entry upon his lands and the performance of the work herein authorized, and the amount of the damages so agreed upon shall be a town charge, and shall be audited and paid in the same manner as other town charges. If the commissioners are unable to agree with such owner upon the amount of damage thus sustained, the amount thereof shall be ascertained and determined and paid in the same manner as damages for the laying out and opening of highways are required by law to be ascertained,

determined and paid, where the commissioners and land owner are unable to agree upon the amount thereof.

Added by L. 1891, ch. 212; amd. L. 1899, ch. 344.

Provisions for ascertaining damages upon laying out and opening highways, §§ 83-97, *post.*

Provision for widening highways worn away by streams or other causes, L. 1893, ch. 607.

Constitutional provisions as taking private property for public use, Constitution, art. 1, § 7, page 167, *post.*

A town may be liable for negligence of commissioner in not seeing that highway is put in proper condition after a wash-out. Farman v. Town of Ellington, 46 Hun, 41; affd., 124 N. Y., 662.

Where an act authorizing the taking of private property for public purposes provides for a just compensation to the owner, it is not unconstitutional because it omits to make the assessment and payment of damages a condition precedent to an entry upon and occupation of the premises for the purposes of a road. Smith v. Helmer, 7 Barb., 416.

9. Require overseers of highways to inspect highways and bridges in their respective districts before May first, and, within five days thereafter, to report in writing to the commissioners such repairs as they deem necessary. Within twenty days after the receipt of such reports, the commissioners of highways shall personally inspect such highways and bridges in the town as are reported to be in need of repairs and shall, so far as practical, personally superintend the repair thereof.

Added by L. 1901, ch. 129.

Hitherto it has been held that there was no duty on overseers of highways in regard to bridges (Bartlett v. Crozier, 17 Johns., 439), but this amendment seems to charge them with at least reporting defective bridges; see, also, notes to § 20, *post.* Form of report No. 20, *post.*

As to general duty of commissioners to repair highways and bridges, see § 4, subds. 1, 9, *ante*, and §§ 95, 97, 130-145, *post.*

Liability for defective highways and bridges, §§ 16-18, *post.*

General duties of overseers, § 20, *post.*

General powers and duties of commissioners of highways.

Commissioners of highways are independent public officers, and while acting as such commissioners by virtue of the powers conferred by statute, proceed independently of any direction on the part of the town, and they can affect the rights of towns in no other manner than that prescribed by statute. Flynn et al. v. Hurd, 118 N. Y., 19; People ex rel. Van

Keuren v. Town Auditors, 74 N. Y., 310; People ex rel. Everett v. Super's, 93 N. Y., 397.

They have no power to bind the town by contract for materials, or anything else of this order, regardless of any local custom authorizing them so to bind the town. People ex rel. Bowles v. Burrell, 14 Misc., 217; People ex rel. Bevins v. Supervisors, 82 Hun, 298. And see cases under § 10, *post.*

A commissioner of highways has no general authority, as such commissioner to borrow money, or to give promissory notes, and thereby to bind his successors in office. Van Alstyne v. Freday, 41 N. Y., 174.

The commissioners of highways are exclusively charged with the general care, superintendence, repair, and improvement of the highways and bridges within their towns. Matter of Application of R. E. R. Co., 123 N. Y., 351; Berlin Iron Bridge Co. v. Wagner, 57 Hun, 346.

Commissioners have no power to authorize a nuisance upon the highway. The People v. Flower et al., 43 N. Y. S. R., 744;17 N. Y. Supp., 444; affd. 139 N. Y., 621.

Commissioners of highways may invest public funds lying in their hands and enforce securities taken therefor, but in so doing they assume the entire risk. Commissioners of Highways of Cortlandville v. Peck, 5 Hill, 215.

Commissioners of highways are not liable individually for their acts, unless they were unauthorized or malicious. Myers v. Martin et al., 17 Week. Dig., 110.

But a commissioner may be held liable in a civil action for failure to repair a highway. Hover v. Barkhoof, 44 N. Y., 113; People ex rel. Van Keuren v. Town Auditors, 74 N. Y., 310.

A commissioner of highways may sue his predecessor in office to recover money in the hands of the latter at the end of his term. Victory v. Blood, 25 Hun, 515; appeal dismissed, 93 N. Y., 650.

Street surface railroad may not cross highway without consent of local authorities. Matter of Syracuse and South Bay R. Co., 33 Misc., 510.

For election of commissioners of highways, see Town Law, §§ 12, 15, pages 179, 180, *post.*

Persons eligible to be commissioners of highways, Town Law, § 50, Public Officers Law (L. 1892, ch. 681), § 3.

Oath of office of commissioners of highways, Town Law, § 51, page 182, *post;* Public Officers Law, § 10. Form, No. 8, *post.*

Undertaking of commissioner of highways, Town Law, § 63, page 182, *post;* Public Officers Law, §§ 11-15. Form No. 9, *post.*

Term of office of commissioner of highways, Town Law, § 13, page 179, *post;* People ex rel. Lovett v. Randall, 151 N. Y., 497.

Vacancy in the office of commissioner of highways, Town Law, § 65, page 183, *post.*

Resignation of commissioner of highways, Town Law, § 64, page 183, *post;* Public Officers Law, § 21. Forms, Nos. 6, 7, *post.*

Removal of commissioner of highways for misconduct in office, Public Officers Law, § 25a.

Commissioners of highways are fence viewers. Town Law, § 21, page 180, *post.*

General provisions as to fences, Town Law, §§ 100-109.

Purchase of apparatus for town fire company, Town Law, § 171.

General duty of commissioners as to cattle straying upon highways, Code Civ. Proc., §§ 3082-3115; Town Law, § 22; Village Law, § 89, subd. 2.

Compensation of commissioners of highways, Town Law, § 178, subd. 1, page 185, *post.*

Delivery of books, etc., to successor in office, Town Law, § 84, page 184, *post.*

§ 5. **Mile-stones and guide-boards.**— Commissioners of highways may cause mile-boards or stones to be erected upon the highways in their town as they think proper; they shall also cause guide-posts, with proper inscriptions and devices, to be erected at the intersectings of such highways therein, as they may deem necessary, which shall be kept in repair at the expense of the town, by the overseers of the highways of the districts in which they are respectively located. Upon the written application of five resident taxpayers of any town or twenty resident taxpayers of the county in which any such town is located to the commissioners of highways, requesting the erection of one or more guide-boards at the intersection of highways in such town, the commissioner of highways shall cause to be erected at the intersections mentioned in such application such guide-boards, indicating the direction, distances and names of the towns, villages or cities to or through which such intersecting highways run. Such application shall designate the highway intersections at which such guide-boards are requested to be erected and may contain suggestions as to the inscriptions and devices to be placed upon such boards. The cost of the erection and maintenance of such board shall be a town charge. If the commissioner of highways refuses or neglects for a period of sixty days after receiving within* application to comply with the request contained in such application, he shall for such neglect or refusal

* So in the original.

forfeit to the town the sum of twenty-five dollars to be recovered by the supervisor in the name of the town, and the amount so recovered shall be set apart for the erection of such guide-boards.

For penalties for injuring mile-stones and guide-posts, see § 153, *post.*

Wilful or malicious injury to mile-boards, mile-stones or guide-posts punishable by imprisonment for two years. Penal Code, § 639.

For provisions as to mile-stones and guide-posts on turnpikes, see Trans. Corp. L., § 136.

Erection of sign-boards and gates and stationing flagmen at railroad crossings. Railroad Law, § 33.

Form of application for erection of guide-boards, No. 21, *post.*

§ 6. **Road machines and implements.**— Commissioners of highways may, upon the request of one or more overseers of the highway districts of their town, contract for and purchase for such district or districts, upon credit or otherwise, a good and sufficient scraper and plow, or either of them, and if a majority of the taxpayers of one or more highway districts in any town, representing more than one-half of the taxable property in such district or in each of such districts, to be ascertained by the last preceding assessment roll and certified to as such by the town clerk of the town, petition the commissioner or commissioners of highways of such town therefor, such commissioners may together with the supervisors and overseer or overseers of such district or districts, contract for and purchase upon credit or otherwise, a road machine for the use of such district or districts, which implements shall be used, cared for and owned by such district or districts jointly. Such implements shall be paid for out of the highway tax of the district or districts for which they are purchased, and may be paid for in annual installments, not exceeding five. If purchased for more than one district the amount paid by each shall be in proportion to the amount of highway tax; a copy of the note or contract issued upon the purchase of such implements, shall be filed in the office of the town clerk of the town in which such town or road district is situated, and it shall be the duty of said town clerk to present a statement of the sum due thereon to the town board at each annual meeting thereafter for the audit of town charges, and the town board shall audit such sum and certify the same to the

board of supervisors of the county. Not more than one-half of the highway tax of any district shall be applied in payment therefor, in any one year. The portion of such tax so applied, shall be required to be paid in money, and be assessed and levied upon the property of such district or districts, and collected in the same manner as other town charges are assessed, levied and collected, except that the amount thereof shall be put in a separate column upon the tax roll, and the board of supervisors of the county shall cause the sum certified by the town board, to be levied upon the taxable property of such highway district. Such commissioner of highways shall with the assistance of the overseer of highways, in any road district which is to be charged with the payment for such machine after the completion of the assessment roll, and ten days before the meeting of the board of supervisors of the county, make and deliver to the supervisor of such town a list of the persons in such district or districts who are named in the last assessment roll of the town and chargeable with the payment of a tax for such machine. The commissioner or commissioners of highways may, also, with the approval of the town board, purchase and hold for the use of the town at large, one or more road machines, and pay for the same with money appropriated and set apart for highway purposes. It shall be the duty of the commissioner or commissioners of highways of each town to keep the road machines belonging to such town, or any road district or districts in such town in repair, if such repairs are reasonable, and pay the expenses thereof out of the general highway funds of the town, and also to provide a suitable place for housing and storage of all tools, implements and machinery that are owned by the town or by the several highway districts and cause these tools and implements and machinery to be stored therein when not in use. When such repairs upon any road machine belonging to any road district or districts shall exceed the sum of eight dollars in any one year, such expense shall be assessed and levied upon the property of such districts in the same manner as above provided for the collection of the purchase money of said machines, and when collected shall be paid to the commissioner or commissioners of highways of said town.

Revised from 1 R. S., ch. 16, tit. 1, art. 1, §§ 11, 12; L. 1890, ch. 493; amd. L. 1895, ch. 586; L. 1896, ch. 987; L. 1898, ch. 155.

The statute imposing liability upon towns for defects in highways is broad enough to cover injuries resulting from the leaving of a road-scraper by the side of a road. Whitney v. Town of Ticonderoga, 127 N. Y., 40; but see Robinson v. Town of Fowler, 80 Hun, 101; Mullen v. Village of Glens Falls, 11 App. Div., 275.

§ 7. **Stone crushers and materials.**— The town board and commissioner or commissioners of highways of any town may, when authorized by a majority vote of the electors voting thereon, by ballot, at the annual or at a special town meeting, purchase a machine for crushing stone, a suitable roller, and such other machinery as may be necessary to be used, under the direction of the commissioner or commissioners of highways of said town, for the improvement of the highways thereof, and the commissioners of highways of any such town may, in any year, when authorized by a majority vote of the electors voting thereon, by ballot, at the annual or at a special town meeting expend in said year a sum not exceeding two thousand dollars, for the purpose of purchasing stone, and quarrying, breaking, crushing and placing the same on the highways, in such road district or districts as the town board may direct and defraying the expenses of operating such machine, and shall present the account and vouchers for said purchases and expenses to the town board for audit, and the amount audited, together with the cost of such stone-crushing machine, when not before included, shall be levied and collected as other town audits.

Revised from L. 1884, ch. 220, §§ 1-5; amd. L. 1895, ch. 411; L. 1902, ch. 129, in effect March 13, 1902.

For special act authorizing the expenditure of additional sums in certain towns adjoining cities of not less than 35,000 inhabitants, for grading, macadamizing and improving highways, see L. 1895, ch. 499.

Where a road machine is purchased pursuant to this section, the vendor of the machine is entitled to a peremptory writ of mandamus compelling the overseers and commissioners to perform the duty imposed upon them by the statute, viz., to make and deliver the list of persons chargeable with payment of the tax for such machine. And where the petition for the purchase of the machine recites that the petitioners constitute a majority of the taxpayers representing more than one-half of the taxable property of the district, and such petition is certified by the town clerk, the truth of such recital cannot be inquired into upon man-

damus proceedings, nor, it seems, can the relator's rights be defeated by producing affidavits showing fraudulent representations as to the machine, or that the machine was to be purchased after trial only and that after the trial it was rejected. People ex rel. Climax Co. v. Commissioner, 48 App. Div., 550.

§ 8. **Custody of stone crushers.**— Such machine, when purchased, shall be under the care and custody of the commissioners of highways of the town; and where there is an incorporated village constituting a separate highway district, in any town, they may, by an agreement with the trustees of the village, permit an equitable use of the machine to such separate village district.

Revised from L. 1884, ch. 220, § 3.

§ 9. **Additional tax.**— Whenever the commissioners of highways of any town shall determine, that the sum of five hundred dollars will be insufficient to pay the expenses actually necessary for the improvement of highways and bridges, they may cause a vote to be taken by ballot at any town meeting, to be duly called, authorizing such additional sum to be raised as they may deem necessary for such purpose, not exceeding one-third of one per centum upon the taxable property of the town, as shown by the last assessment-roll thereof.

Revised from L. 1832, ch. 274, and L. 1857, ch. 615, § 1.

Provisions for special town meeting, Town Law, § 23 *et seq.*

The board of supervisors of a county may authorize towns to raise additional sums of money for highway purposes. County Law, §§ 69, 70, *post*, pages 173, 174. See Ghiglione v. Marsh, 23 App. Div., 61; People ex rel. Wakeley v. McIntyre, 154 N. Y., 628.

An omission to take the vote required by this section may be cured by the action of the town board. Edwards v. Ford, 22 App. Div., 277; see also Birge v. B. I. B. Co. et al., 133 N. Y., 477, and Berlin Iron Bridge Co. v. Wagner, 57 Hun, 346.

§ 10. **Extraordinary repairs of highways or bridges.**— If any highway or bridge shall at any time be damaged or destroyed by the elements or otherwise, or become unsafe, the commissioner of highways of the town in which such highway or bridge may be cause the same to be immediately repaired or rebuilt, if consented to by the town board, but if the expense thereof exceed five hun-

dred dollars, it shall be done under a written contract therefor which must be approved by the town board and the commissioners of highways shall present the proper vouchers for the expense thereof to the town board, at their next annual meeting, and the same shall be audited by them and collected in the same manner as amounts voted at town meetings.

Revised from L. 1858, ch. 103, § 1; L. 1865, ch. 442, § 1; amd. L. 1895, ch. 666; L. 1899, ch. 84.

For provisions where towns are jointly liable for a bridge see § 130 *et seq.*, *post.*

See notes to § 1, subds. 1, 9, *ante*, and § 11, *post.*

Form of consent of town board, No. 22, *post.*

Contracts made under this section should be in the name of the town. Town Law, § 182; Town of Saranac v. Groton Bridge Co., 55 App. Div., 134.

The subsequent approval of the town board may cure a failure to obtain consent required by this section. Edwards v. Ford, 22 App. Div., 277.

It seems that the provisions of section 10 are broad enough to authorize the erection of a new bridge by a town. Hall v. Town of Oyster Bay, 61 App. Div., 508; and see People ex rel. Slater v. Smith, 83 Hun, 432.

A commissioner of highways may replace a wooden bridge with an iron one, where the consent of the town board gave him discretion as to the construction of the bridge, and mandamus will lie to compel the audit of a claim where consent to the repairs was given by the town board. People ex rel. Slater v. Smith, 83 Hun, 432.

While the consent of the town board is necessary, yet, when it is given, no conditions may be imposed as to the manner of receiving bids or the construction of the bridge. If the town board refuses to audit a claim because of a violation of conditions of this kind, certiorari will lie to review their proceedings. People ex rel. Groton Bridge Co. v. Town Board, 92 Hun, 585. But see Town of Saranac v. Groton Bridge Co., 55 App. Div., 134, holding that a conditional consent is valid and that the conditions attached to the consent must be complied with.

The determination of the town board that a bridge is unsafe and the adoption of a resolution to build a new one is sufficient to authorize the commissioner to contract therefor, regardless of any attempted delay by the town board to obtain legal advice. Basselin v. Pate, 30 Misc., 368.

Where appropriations made under § 19, *post*, are insufficient to meet the highway expenses, the commissioners should proceed to raise funds under this and the following section, and there is no provision of law whereby a commissioner of highways may contract any indebtedness which will bind the town except under this section, and any other indebtedness should be sued as a claim against the commissioners as

such. Funds provided for current repairs may not be expended for former year's repairs. People ex rel. Peterson v. Clark, 45 App. Div., 65; Lyth & Sons v. Town of Evans, 33 Misc., 221; and see Wells v. Town of Salina, 119 N. Y., 280.

And the existence of a local custom to buy materials for repairs upon the credit of the town does not affect this rule. People ex rel. Bowles v. Burrell, 14 Misc., 217.

But where the consent is given by the town board, though there be no funds on hand, the expenditures will be a claim against the town for which it would have to reimburse the commissioner of highways. Whitlock v. Town of Brighton, 2 App. Div., 21; affd. 154 N. Y. 781.

Towns have no general power to borrow money for municipal purposes or to pay town charges. Wells v. Town of Salina, 119 N. Y., 280.

A town may not plead lack of funds as defense to an action for injuries sustained through a defective highway, when it could have raised funds under this section for the purpose of making the needed repairs. Whitlock v. Town of Brighton, 2 App. Div., 21; affd. 154 N. Y., 781; McMahon v. Town of Salem, 25 App. Div., 1.

A contract may be valid though the name of one commissioner was signed by another where the former knowing the fact, acts with the other commissioners afterward in reference to the bridge; as to the personal liability of commissioners on their contracts for highway purposes. Boots v. Washburn et al., 79 N. Y., 207.

§ 11. **Auditing expense thereof.**— The town board may be convened in special sessions by the supervisor, or in his absence, by the town clerk, upon the written request of any commissioners of highways, and the bills and expenses incurred in the erection or repairs of any such highways or bridges, may then be presented to, and audited by the town board; and the supervisor and town clerk shall issue a certificate, to be subscribed by them, setting forth the amount so audited and allowed, and in whose favor, and the nature of the work done and material furnished, and such certificate shall bear interest from its date, and the amount thereof, with interest, shall be levied and collected in the same manner as other town expenses.

Revised from L. 1858, ch. 103, § 2.

See notes to § 10, *ante*, and § 12, *post*.

Request to convene town board, No. 23, *post*.

A town board having consented to the repair of a bridge must allow the reasonable expenses thereof, and mandamus will lie to compel them to do so. People ex rel. Slater v. Smith, 83 Hun, 432; but see People ex rel. Myers v. Barnes et al., 114 N. Y., 317.

That certiorari will lie to review the proceedings of the town board in refusing to audit a claim for work which they consented should be done, and that it is too late to question the necessity of the bridge after consent is given and the work done. See People ex rel. Groton Co. v. Town Board, 92 Hun, 585.

§ 12. **Accounts, how made out.**— No account for services rendered, or material furnished according to the provisions of this chapter, shall be allowed by such board unless the same shall be verified in the same manner as town accounts are required by law to be verified, nor unless the commissioners of highways shall certify that the service has been actually performed, and the material was actually furnished, and that the same was so performed or furnished by the request of such commissioners; and the town board may require and take such other proof as they may deem proper, to establish any claim for such labor and material, and the value thereof.

Revised from L. 1858, ch. 103, § 3.

For verification of accounts against town, see Town Law, § 167, below.

Form of account, verification and certificate, see Nos. 24-26, *post.*

The Town Law (L. 1890, ch. 569), provides in § 167, as follows:

"No account shall be audited by any board of town auditors, or supervisors, or superintendent of the poor, for any service or disbursements, unless such account shall be made out in items and accompanied with an affidavit attached thereto, and to be filed with such account, made by the person presenting or claiming the same, that the items of such account are correct, and that the disbursements and services charged therein have been in fact made or rendered, or are necessary to be made or rendered, at that session of the board, and stating that no part thereof has been paid or satisfied; and the chairman of the board or either of the superintendents may administer any oath required under this section."

Fees of an attorney hired by a commissioner of highways to institute proceedings to lay out a highway are not a proper charge, but expenses of the commissioner of highways, after appointment of commissioners by the court, in support of the project, whether attorney's fees or otherwise, may be allowed. People ex rel. Bevins v. Supervisors, 82 Hun, 298; but see Clute v. Robison, 38 Hun, 283; Duntz v. Duntz, 44 Barb., 459.

It was formerly held that costs awarded against a commissioner in an unsuccessful defense or proceedings to lay out a highway could not

be recovered from the town until duly audited. Sherman v. The Town of Hamburg, 8 Hun, 643.

A majority of the commissioners may act fully in hiring services, when the majority act with the knowledge of all. Furman v. Taylor, 41 N. Y. S. R., 791; 16 N. Y. Supp., 703; Boots v. Washburn, 79 N. Y., 207.

And it has even been held that they could do so where the third commissioner was not consulted at all. Clute v. Robison, 38 Hun, 283.

A claim for materials furnished upon request of a commissioner of highways cannot be collected from the town, unless the claim is presented to the town board for audit as prescribed by the statute. Lyth & Sons, v. Town of Evans, 33 Misc., 221; People ex rel. Hamm v. Town Auditors, 43 App. Div., 22; People ex rel. Bevins v. Supervisors, 82 Hun, 298; People ex rel. Myers v. Barnes et al., 114 N. Y., 317.

§ 13. **Unsafe toll-bridge.**— Whenever complaint in writing, on oath, shall be made to the commissioners of highways of any town in which shall be, in whole or in part, any toll-bridge belonging to any person or corporation, representing that such toll-bridge has from any cause become, and is unsafe for the public use, such commissioners of highways shall forthwith make a careful and thorough examination of such toll-bridge, and if upon the examination thereof, they shall be of the opinion that the same has from any cause become dangerous or unsafe for public use, they shall thereupon give immediate notice to the owners of such toll-bridge, or to any agent of such owners, acting as such agent, in respect to such bridge, that they have on complaint made, carefully and thoroughly examined the bridge, and found it to be unsafe for the public use. Such owners shall thereupon immediately commence repairing the same, and cause such repairs to be made within one week from the day of such notice given, or such reasonable time thereafter as may be necessary to thoroughly repair the bridge, so as to make it in all respects, safe and convenient for public use; and for neglect to take prompt and effective measures so to repair the bridge, its owners shall forfeit twenty-five dollars; and shall not demand or receive any toll for using the bridge, until the same shall be fully repaired; and the commissioners of highways shall cause such repairs to be made; and the owners of the bridge shall be liable for the expense thereof, and for the services of the commissioners at two dollars per day; and upon the neglect or

refusal to pay the same upon presentation of an account thereof, the commissioners of highways may recover the same by action, in the name of the town.

Revised from L. 1873, ch. 448, §§ 1-3.

For general provisions as to repair and construction of bridges, see § 4, subds. 1, 9, *ante*, and §§ 130-145, *post*.

Forms of complaint and order, Nos. 27-28, *post*.

§ 14. **Drainage, sewer and water pipes in highways.**— The commissioners of highways may upon written application of any resident of their town, grant written permission to lay and maintain drainage, sewer and water pipes and hydrants under ground, within the portion therein described, of any highway within the town, but not under the traveled part of the highway, except across the same, for the purposes of sewerage, draining swamps or other lands, and supplying premises with water upon condition that such pipes and hydrants shall be so laid as not to interrupt or interfere with public travel upon the highway. The consent of the commissioner shall be executed in duplicate, signed by him and endorsed with the written approval of the supervisor and the acceptance of the applicant, and one of such duplicates shall be delivered to the applicant and the other filed with the town clerk. The consent shall also contain a provision to the effect that it is granted upon the condition that the applicant will replace all earth removed, and leave the highway in all respects in as good condition as before the laying of such pipes; that the applicant shall keep such pipes and hydrants in repair and save the town harmless from all damages which may accrue from their location in the highway; that upon notice by the commissioner, the applicant will make any repairs required for the protection or preservation of the highway; that upon his default, such repairs shall be made by the commissioner at the expense of the applicant, and such expenses shall be a lien prior to any other lien upon the land benefited by the use of the highway for such pipes or hydrants, and that the commissioner may also, upon the applicant's default, revoke the permission for the use of the highway, and remove therefrom such pipes and hydrants.

Revised from L. 1873, ch. 63, §§ 1, 2; L. 1886, ch. 452, § 1; amd. L. 1897, ch. 204, § 1.

Commissioners of highways are water commissioners. L. 1869, ch. 888; amd. L. 1888, ch. 527.

Pipes of hot water, hot air and steam companies in highways. L. 1879, ch. 317.

Pipes of water works company in highways. Trans. Corp. L., § 82.

Gas and water pipes and sewers in county roads. L. 1890, ch. 555, § 8.

Gas pipes in highways. Trans. Corp. L., § 61.

Pipes of pipe-line corporations in highways. Id., § 45.

Water pipes in any roads of county to supply village. Village Law, § 226.

For form of application under this section, see No. 29, *post.*

For form of consent under this section, with indorsements, see Nos. 30-32, *post.*

See Nicoll v. Sands et al., 131 N. Y., 19, holding that the commissioners were not obliged to superintend the laying of pipes in a highway.

§ 15. **Actions for injuries to highways.**— The commissioners of highways may bring an action, in the name of the town, against any person or corporation, to sustain the rights of the public in and to any highway in the town, and to enforce the performance of any duty enjoined upon any person or corporation in relation thereto, and to recover any damages sustained or suffered or expenses incurred by such town, in consequence of any act or omission of any such person or corporation, in violation of any law or contract in relation to such highway.

Revised from L. 1855, ch. 255, §§ 1, 2; L. 1878, ch. 49, § 4.

Penalties for injuries to highways, etc., § 153, *post.*

Commissioner to recover these penalties, §§ 23, 164, *post.*

Action to be in name of town, Town Law, § 182, *post;* and see Town of Clay v. Hart and Town of Fort Covington v. U. S. & C. R. R. Co., below.

Duty of railroad corporations to restore highway at crossings to its original condition, see Railroad Law (L. 1890, ch. 565), § 11.

Bringing an action in the name of the commissioners of highways for injuries to a highway and a nonsuit in that action will not bar a subsequent action by the commissioners in the name of the town for the same injuries. The expense of abating a nuisance or making repairs chargeable to a defendant, may be recovered of him. Town of Clay v. Hart, 25 Misc., 110; affd. 41 App. Div., 625.

Highways are entitled to lateral support from adjacent lands whether they be in their natural state or in an improved condition, and one digging in such a way as to endanger a highway may be enjoined.

Milburn v. Fowler, 27 Hun, 568; Finegan v. Eckerson, 26 Misc., 574; but see s. c., 32 App. Div., 233.

Where commissioners of drainage without the consent of the town authorities cut a channel across a highway and do not properly bridge it, the commissioners of highways may maintain an action against them to compel the construction of a proper bridge. Town of Conewango v. Shaw, 31 App. Div., 354.

A town may maintain an action to enjoin a traction company from tearing up and obstructing a highway without legal authority and to compel it to restore to its original condition that portion of the highway already torn up. Town of Eastchester v. N. Y. W. & C. Tract. Co., 30 Misc., 571; Town of Windsor v. D. & H. C. Co., 92 Hun, 127.

A commissioner of highways had no power to prescribe how a railroad company should restore a railroad to its original condition, but he could maintain an action to compel it to do so. Post v. W. S. R. R. Co. et al., 123 N. Y., 580. And see Town of Palatine v. N. Y. C. & H. R. R. R. Co., 22 App. Div., 181.

A town being responsible for the maintenance and repair of highway bridges can maintain an action against any one who negligently or wilfully injures them. Bidelman v. State of New York, 110 N. Y., 232; Town of Fort Covington v. U. S. & C. R. R. Co., 8 App. Div., 223; affd., 156 N. Y., 702.

And such an action is properly brought in the name of the town, and proof upon the trial of authority by a town meeting to bring the action is not necessary, and objection to authority to sue should be taken by motion. The complaint of such an action may be verified by the supervisors. Town of Fort Covington v. U. S. & C. R. R. Co., 8 App. Div., 223; affd., 156 N. Y., 702.

A private abutter may recover for injuries to a walk which he is obliged to maintain. Parish v. Baird, 160 N. Y., 302.

For a consideration of the general duties of railroads in restoring and maintaining highways, see Allen v. Buffalo R. & P. R. Co., 151 N. Y., 434.

The right of action against a railroad company for failing to restore a highway to its original condition is not barred by the statute of limitations, as the duty is a continuous one. Town of Windsor v. D. & H. C. Co., 92 Hun, 127.

A railroad company in using a public highway must cause as little injury as may be. Wiley v. Smith, 25 App. Div., 351; Schild v. C. P. N. & E. R. R. Co., 133 N. Y., 446.

The commissioner of highways must take care of the approaches to a railroad crossing. Bryant v. Town of Randolph, 133 N. Y., 70.

§ 16. **Liability of towns for defective highways.**— Every town shall be liable for all damages to person or property, sustained

by reason of any defect in its highways or bridges, existing because of the neglect of any commissioner of highways of such town. No action shall be maintained against any town to recover such damages, unless a verified statement of the cause of action shall have been presented to the supervisor of the town, within six months after the cause of action accrued; and no such action shall be commenced until fifteen days after the service of such statement.

Revised from L. 1881, ch. 700, § 1.

Duty to repair highway and bridges and keep same in order, § 4, subds. 1, 9, *ante*, §§ 20, 130, *et seq.*, *post.*

For limitation of action for negligence see notes to § 18, *post.*

Form of claim, No. 34, *post.*

The provisions of this section are broad enough to impose a liability not only for injuries received from defects in the bed of the highway, but also for injuries resulting from obstructions placed, or allowed, within the bounds of the highway, as leaving a road-scraper upon the side of the highway. Whitney v. Town of Ticonderoga, 127 N. Y., 40.

Also injuries received from overhanging limbs. Embler v. Town of Walkill, 57 Hun, 384; affd., 132 N. Y., 222; and from a wooden awning over a sidewalk, Hume v. Mayor, 74 N. Y., 264; and from a banner suspended in the street. Champlin v. Village of Penn Yan, 34 Hun, 33; 102 N. Y., 680.

Also from an irregular pile of lumber left by the roadside. Quinn v. Town of Sempronius, 33 App. Div., 70; Burns v. Town of Farmington, 31 App. Div., 364; Tinker v. N. Y., Ontario & Western R. Co., 157 N. Y., 312.

But not for injuries resulting from horses shying at a pile of ordinary stones of no unusual appearance. McCord v. Town of Ossining, 10 N. Y. S. R., 407; affd., 118 N. Y., 686; and see Mullen v. Village of Glens Falls, 11 App. Div. 275.

The same duty of care imposed upon towns or commissioners of highways is imposed upon turnpike companies. Fox v. Union Turnpike Company, 59 App. Div., 363.

And if the turnpike company fails in this duty and the public is thereby endangered, the municipality may make the necessary repairs and collect the expenses thereof from the company. F. & S. R. R. & T. Co. v. Village of Fayetteville, 37 Misc., 223.

There was formerly no liability on a town to keep its highways and bridges in repair and no liability for injuries received through their defective condition. People ex rel. Loomis v. Board of Town Auditors, 75 N. Y., 316.

And this was not changed until after the enactment of ch. 700 of the L. 1881; but there is a manifest difference between the liability of villages and cities and that of rural towns and counties for the repair

of their highways. Monk v. Town of New Utrecht, 104 N. Y., 552; Bush v. D., L. & W. R. R. Co., 166 N. Y., 210; Dorn v. Town of Oyster Bay, 84 Hun, 510; Albrecht v. County of Queens, 84 Hun, 399; Snowden v. Town of Somerset, 171 N. Y., 99.

This statute had no retroactive effect and did not render towns liable for injuries received before it went into effect. Frasier v. Town of Tompkins, 30 Hun, 168.

And this statute is to be strictly construed in favor of the town. Barber v. Town of New Scotland, 88 Hun, 522.

Since the enactment of ch. 700 of the L. 1881, towns have been liable for neglect to keep their highways and bridges in repair, only where facts are shown which would, before the enactment of that statute, have been sufficient to have charged the commissioners of highways with actionable negligence. Acker v. Town of New Castle, 48 Hun, 312; Snowden v. Town of Somerset, 171 N. Y., 99.

But the town is liable only in cases where before that statute the commissioners of highways would have been liable had they had funds to make the needed repairs, or had they had authority to procure such funds. Bryant v. Town of Randolph, 133 N. Y., 70; Clapper v. Town of Waterford, 131 N. Y., 382; Lane v. Town of Hancock, 142 N. Y., 510; Barber v. Town of New Scotland, 88 Hun, 522.

And a verdict against a town will be set aside where the evidence would not warrant a verdict against the commissioners for neglect to repair. Waller v. Town of Hebron, 5 App. Div., 577; Patchen v. Town of Walton, 17 App. Div., 158.

The principle that the liability of a town for damages for personal injuries sustained by reason of the unsafe condition of a highway is limited to the liability of its highway commissioners, does not apply to a city or village. Burns v. City of Yonkers, 83 Hun, 211.

This liability extends to defects in any part of the traveled portion of the highway, including the part used for turning out when teams pass each other. Newell v. Town of Stony Point, 59 App. Div., 237; and see Whitney v. Town of Ticonderoga, *supra.*

A town is not liable for an overflow of water where the defect, which caused the overflow, was not a defect in the highway, but was in continuing an insufficient culvert erected by a turnpike company. There is no duty on towns to provide culverts to carry off water in time of freshets. Barber v. Town of New Scotland, 88 Hun, 522.

The decision of commissioners of highways to change the course of a highway to avoid a boulder is of a judicial nature, and the town is not liable for an error in judgment in so doing. Barrett v. Town of Walworth, 64 Hun, 526; and see Monk v. Town of New Utrecht, 104 N. Y., 552; also Patchen v. Town of Walton, 17 App. Div., 158, holding that the determination of commissioners of highways that certain precautions are unnecessary may be a defense to an action for injuries

resulting from the omission of such precautions; but see Pelkey v. Town of Saranac, 67 App. Div. 337.

A town may be held liable, though the negligence was not the negligence of the particular commissioner of highways in office at the time the action is brought. Shaw v. Town of Potsdam, 11 App. Div., 508; approved in Allen v. Town of Allen, 33 App. Div., 463.

Towns are not obliged to keep the whole of a highway, from one boundary to the other, free from obstructions and fit for the use of travelers, though it must not allow an actual obstruction of apparent danger to travelers to remain in a highway. Barrett v. Town of Walworth, 64 Hun, 526. But see Whitney v. Town of Ticonderoga and Newell v. Town of Stony Point, *supra.*

The negligence required to be shown, in order to maintain an action, is the omission on the part of the commissioners of highways to use ordinary care under all the circumstances in the performance of the duty imposed by law upon them, which omission is proximate cause of the injury. The ordinary care referred to is such care and conduct as a reasonable and prudent person would have ordinarily exercised under the circumstances in question. Barber v. Town of New Scotland, 88 Hun, 522; Lane v. Town of Hancock, 142 N. Y., 510; Dorn v. Town of Oyster Bay, 84 Hun, 510; see Snowden v. Town of Somerset, 171 N. Y., 99.

As to liability for omissions of commissioners *de facto*, see Farman v. Town of Ellington, 46 Hun, 41.

Towns are not liable for injuries resulting from accidents which reasonable foresight and prudence would not have avoided or anticipated. Sutphen v. Town of North Hempstead, 80 Hun, 409; Kerr v. Joslin, 49 N. Y. S. R., 257; 20 N. Y. Supp., 929; Snowden v. Town of Somerset, 171 N. Y., 99.

And this immunity is extended to plank-road and turnpike corporations charged with the duty of keeping highways in repair. Benedict v. Goit, 3 Barb., 459; Dexter v. Broat, 16 Barb., 337. See Fox v. Union Turnpike Co., 59 App. Div., 363, *supra.*

The amount of care required to be exercised over highways in remote or sparsely settled districts is not as great as in villages or cities. Glasier v. Town of Hebron, 131 N. Y., 447; Waller v. Town of Hebron, 5 App. Div., 577.

And the Town Law (L. 1890, ch. 569), § 2, making towns municipal corporations, has not changed this rule. Dorn v. Town of Oyster Bay, 84 Hun, 510.

Failure to exercise vigilance to discover defects in an abutment of a bridge, which would have been apparent upon careful examination, constitutes negligence for which the town is liable. Boyce v. Town of Shawangunk, 40 App. Div., 593.

Failure of commissioner to exercise reasonable diligence to see that the overseers carry out his directions as to care and repair of highways, may render the town liable for resulting injuries. Farman v. Town of Ellington, 46 Hun, 141; Fay v. Town of Lindley, 33 N. Y. S. R., 539; 11 N. Y. Supp., 355.

A town is not liable to a person injured by an obstruction in a highway placed there by legislative authority. Riley v. Town of Greenburgh, 3 N. Y. Supp., 322; 21 N. Y. S. R., 434.

Municipality not liable for injuries resulting from a defective bridge owned and maintained within its bounds by the state. Carpenter v. City of Cohoes, 81 N. Y., 21.

A town is not liable for defects in a bridge which was put up temporarily by the commissioner of highways, acting as a volunteer and not officially, the bridge being erected upon private property to replace a public bridge carried out by a freshet. Ehle v. Town of Minden, 70 App. Div., 275.

Commissioners of highways are not liable (and it would follow that a town is not liable) for injuries resulting from defects in a bridge required to be kept in repair by a railroad company. Roe v. Town of Elmendorf, 52 How. Prac., 232; and see Bush v. D., L. & W. R. R. Co., 166 N. Y., 210; § 4, subd. 1, and notes, *ante.*

A town which undertakes to maintain a highway across lands of a railroad company thereby assumes the responsibility of furnishing a safe way, even though it was not chargeable with the duty of originally constructing the road; nor does the obligation of the railroad company to afford a suitable original construction of the crossing relieve the commissioners of highways of the duty of maintaining suitable approaches. Bryant v. Town of Randolph, 133 N. Y., 70; see Edwards v. Ford, 22 App. Div., 277.

A railroad company which owns the fee of its right of way and has constructed a road along one side of it for the use of travelers, owes such travelers the same duty of protection that it owes travelers upon any public highway. Liekens v. Staten Island Midland R. R. Co., 64 App. Div., 327.

A town was held not liable for a defect in a plank walk constructed by an adjoining owner, especially when the road was in good condition. Clapper v. Town of Waterford, 131 N. Y., 382.

There can be no recovery where the only evidence of negligence is that a depression, several inches deep and several feet long, was permitted in a highway. Grant v. Town of Enfield, 11 App. Div., 358.

Where towns are jointly liable for the repair of a bridge and are jointly liable for its defective condition, it is not necessary to join both in an action for injuries received through such defective condition, but one alone may be sued. Clapp v. Town of Ellington, 87 Hun, 542; affd.,

154 N. Y., 781; *contra*, Theall v. City of Yonkers, 21 Hun, 265; and see Hawxhurst v. Mayor, 43 Hun, 588.

Or both may be joined as defendants. Shaw v. Town of Potsdam, 11 App. Div., 508.

Lack of funds as a defense.

Where the commissioners of highways have not funds with which to make repairs, and have no power to obtain such funds, the town cannot be held liable for injuries resulting from the defects left unremedied. Whitlock v. Town of Brighton, 2 App. Div., 21; affd., 154 N. Y., 781; Monk v. Town of New Utrecht, 104 N. Y., 552; Clapper v. Town of Waterford, 131 N. Y., 382; Young v. Town of Macomb, 11 App. Div., 480; Quinn v. Town of Sempronius, 33 App. Div., 70; Boyce v. Town of Shawangunk, 40 App. Div., 593; McMahon v. Town of Salem, 25 App. Div., 1.

Mere lack of funds alone is no defense. There must also be an inability to raise funds. Same cases, and Warren v. Clement, 24 Hun, 472.

And it must also be shown that the commissioners have sought to avail themselves of all lawful means of raising funds and of the privilege afforded by § 10, *ante*, of making repairs with the consent of the town board, the expenditures for which become a town charge. Pelkey v. Town of Saranac, 67 App. Div., 337; Whitlock v. Town of Brighton, and McMahon v. Town of Salem, *supra*.

And where a city seeks to defend on the ground of lack of funds, it must also show a lack of power under its charter to raise funds. Hines v. City of Lockport, 41 How. Prac., 435; 5 Lans., 16; affd., 50 N. Y., 236.

Lack of funds, and of power to raise them, is no defense to recover for injuries received through misfeasance, as for injuries resulting from an official act which was negligent, as contrasted with an omission to act at all. The action in such a case should be against the individuals. Bennett v. Whitney, 94 N. Y., 302; and see Rector v. Pierce, 3 Thomp. & Cook, 416.

Lack of funds is none the less a good defense though it is shown that the supervisor had funds applicable for repairs where the commissioner had demanded them of him and had not been negligent in instituting proceedings to compel payment over to him. Clapper v. Town of Waterford, 131 N. Y., 382.

Where the commissioner has not funds sufficient to make all needed repairs, it is within his discretion to decide which repairs to make, and, unless his decision is induced by negligence or bad faith, neither the commissioner nor the town is liable for injuries received from the defects which he decided not to remedy, even though his decision was an error in judgment. Patchen v. Town of Walton, 17 App. Div., 158;

Young v. Town of Macomb, 11 App. Div., 480; Monk v. Town of New Utrecht, 104 N. Y., 552.

And the commissioners are presumed to have exercised their discretion and to have acted in good faith in making the decision as to what repairs shall be made. People ex rel. Slater v. Smith, 83 Hun, 432; Garlinghouse v. Jacobs et al., 29 N. Y., 297.

But a failure to exercise this discretion reasonably may render the town liable for the injuries received. Ivory v. Town of Deerpark, 116 N. Y., 476; and see Patchen v. Town of Walton, 17 App. Div., 158; Pelkey v. Town of Saranac, 67 App. Div., 337.

And where the defect which caused the injuries in suit has existed for more than a year to the knowledge of the commissioner, it is to be presumed that there have been funds applicable to its repair. Whitlock v. Town of Brighton, below; Warren v. Clement, 24 Hun, 472; Ivory v. Town of Deerpark, 116 N. Y., 476.

Lack of funds, and power to raise them, is matter in defense, and must be established by the defendant. Whitlock v. Town of Brighton, 2 App. Div., 21; affd., 154 N. Y., 781; McNulty v. City of New York, 168 N. Y., 117; Boyce v. Town of Shawangunk, 40 App. Div., 593; Quinn v. Town of Sempronius, 33 App. Div., 70; Bullock v. Town of Durham, 64 Hun, 380.

Necessity of barriers or guards at dangerous places.

The question of the duty to protect travelers from driving off a highway, by placing barriers at dangerous places along the highway, has been considered in a great many cases, and towns have been held liable for failure to erect and maintain barriers of this kind in the following cases: Bryant v. Town of Randolph, 133 N. Y., 70; Maxim v. Town of Champion, 50 Hun, 88; affd., 119 N. Y., 626; Fay v. The Town of Lindley, 33 N. Y. S. R., 539; 11 N. Y. Supp., 355; Reid v. The Town of Ripley, 37 N. Y. S. R., 590; 14 N. Y. Supp., 124.

The same rule applies to highways maintained by turnpike companies. Fox v. Union Turnpike Co., 59 App. Div., 363.

And one who makes an excavation on his own land so near a highway as to render travel dangerous may be held liable for failure to properly guard the excavation. Healy v. Vorndran, 65 App. Div., 353.

But barriers are not necessary where travel is reasonably safe without them, and they were held unnecessary in the following cases: Patchen v. Town of Walton, 17 App. Div., 158; Glasier v. Town of Hebron, 131 N. Y., 447; Sutphen v. Town of North Hempstead, 80 Hun, 409; and see Monk v. Town of New Utrecht, 104 N. Y., 552.

It has been held unnecessary under the circumstances of the case to place barriers between a lake and a highway. Roblee v. Town of Indian Lake, 11 App. Div., 435.

The same duty of erecting barriers arises where improvements are being made, and the barriers are necessary to make the highway reasonably safe. McGuinness v. Town of Westchester, 66 Hun, 356; Snowden v. Town of Somerset, 171 N. Y., 99.

Proof of long continued use of highways or bridges without guards or barriers, and entire freedom from accident during all that time, while proper to be submitted to the jury, is not controlling on the question of the necessity of guards or barriers. Maxim v. Town of Champion, 50 Hun, 88; affd., 119 N. Y., 626; Pelkey v. Town of Saranac, 67 App. Div., 337; Wood v. Town of Gilboa, 76 Hun, 175; affd., 146 N. Y., 383; Bryant v. Town of Randolph, 6 N. Y. Supp., 438; 24 N. Y. S. R., 825; 2 Silv. Sup. Ct., 381; Hubbell v. City of Yonkers, 104 N. Y., 434.

There is no necessity of erecting barriers sufficient to stop a team which is running away without restraint, but if it is shown that the omission to erect one was one of the proximate causes of plaintiff's injuries, the omission will render the town liable. Stacy v. Town of Phelps, 47 Hun, 54; Ivory v. Town of Deerpark, 116 N. Y., 476; Wood v. Town of Gilboa, 76 Hun, 175; affd., 146 N. Y., 383.

No special precautions need be taken for the safety of bicyclists. Reasonable safety for ordinary travel is all that is required. Sutphen v. Town of North Hempstead, 80 Hun, 409.

See also, on the question of the necessity of guards and barriers, Lane v. Town of Hancock, 67 Hun, 623; affd., 142 N. Y., 510; Van Gaasbeck v. Town of Saugerties, 82 Hun, 415; affd., 154 N. Y., 767.

Notice of defective condition.

Where the commissioner of highways has no notice, actual or constructive, of the defective condition which caused plaintiff's injuries, the town cannot be held liable. Riley v. Town of Eastchester, 18 App. Div., 94, and cases below.

Notice of the defective condition of a highway may be implied from the continued existence of the defect, and notice to the commissioner of highways is notice sufficient to charge the town. Spencer v. Town of Sardinia, 42 App. Div., 472; and see Malloy v. The Town of Pelham, 4 N. Y. S. R., 828; 25 Week. Dig., 277; Ivory v. Town of Deerpark, 116 N. Y., 476.

Ten years' continuance of the defective condition of a highway has been held to imply notice of the defects sufficient to charge the town with liability for injuries occasioned by the defect. Ivory v. Town of Deerpark, *supra*.

Notice has also been implied from the absence of a railing on a bridge for four years. Bullock v. Town of Durham, 64 Hun, 380; and see Pelkey v. Town of Saranac, 67 App. Div., 337.

Notice has also been implied from the existence of a small hole in the sidewalk of a bridge for a period of two weeks. Foels v. Town of Tonawanda, 75 Hun, 363.

But no notice will be imputed of a latent defect of only a few hours' existence. Riley v. Town of Eastchester, 18 App. Div., 94.

Admissions and declarations of officers of the town made after the accident may be shown to prove notice. Shaw v. Town of Potsdam, 11 App. Div., 508; Vandewater v. Town of Wappinger, 69 App. Div., 325; but see Stone v. Town of Poland, 58 Hun, 21.

But evidence of subsequent repairs is not admissible on the question of negligence. Corcoran v. Village of Peekskill, 108 N. Y., 151; Clapper v. Town of Waterford, 131 N. Y., 382; see Stone v. Town of Poland, *supra.*

It is not always necessary to prove notice of the defective condition to the particular commissioner of highways who is in office at the time of the accident. Shaw v. Town of Potsdam, 11 App. Div., 508; Allen v. Town of Allen, 33 App. Div., 463.

Contributory negligence.

One who is chargeable with contributory negligence cannot recover for the injuries which he may have received. The following circumstances have been held to amount to such contributory negligence as would debar a recovery:

Crossing a bridge when the stream was swollen, and the person crossing knew the condition of the bridge. Day v. Crossman, 1 Hun, 570; 4 Thomp. & Cook, 122.

Driving upon a bridge of proper width with a load so wide as to spread the supporting braces. Lawson v. Town of Woodstock, 20 Week. Dig., 570.

Crossing a swinging bridge, known to be such, at night and without observing whether open or closed. Splittorf v. State of New York, 108 N. Y., 205.

Using an old and badly worn harness for hauling a heavy load on a dangerous road. Patchen v. Town of Walton, 17 App. Div., 159.

As to failure to inspect bridge before crossing with traction engine, see Heib v. Town of Big Flats, 66 App. Div., 83.

The charge of contributory negligence was not sustained under the circumstances of the following cases:

Allowing horses to choose their way on a very dark night. Rector v. Pierce, 3 Thomp. & Cook, 416.

Walking into an unguarded excavation in the approach of a bridge. Chisholm v. State, 141 N. Y., 246.

As to contributory negligence by a bicyclist, see Sutphen v. Town of North Hempstead, 80 Hun, 409.

A traveler has the right ordinarily, and in the absence of visible obstructions, to assume that the highway is in safe condition. Fay v. The Town of Lindley, 33 N. Y. S. R., 539, 11 N. Y. Supp., 355; McDermott v. Conley, 33 N. Y. S. R., 560, 11 N. Y. Supp., 403; Weed v. Village of Ballston Spa, 76 N. Y., 320; Snowden v. Town of Somerset, 171 N. Y., 99.

Even though he may have previously known of the defect. Weed v. Village of Ballston Spa, *supra*.

One passing along a sidewalk is justified in presuming it to be in a safe condition and is not bound to use special care to prevent falling into an uncovered area. McGuire v. Spence, 91 N. Y., 303.

So one approaching a highway bridge presenting no apparent defects may assume that it is safe and proceed upon it. Bidwell v. Town of Murray, 40 Hun, 190; see, also, Burns v. Town of Farmington, 31 App. Div., 364; Lynch v. Village of New Rochelle, 78 Hun, 207; Morell v. Peck et al., 88 N. Y., 398.

Presentment of claim.

The presentment of the statement of the cause of action as prescribed by this section is an absolute condition precedent to the maintenance of an action for injuries from defects in highways. Borst v. Town of Sharon, 24 App. Div., 599; Reining et al. v. City of Buffalo, 102 N. Y., 308; Missano v. Mayor, 160 N. Y., 123; Sheehy v. City of New York, 160 N. Y., 139; Jewell v. City of Ithaca, 39 Misc., 499; affd., 72 App. Div., 220; Curry v. City of Buffalo, 135 N. Y., 366.

For an elaborate discussion of these requirements of notice of claims against municipalities, see Barry v. Village of Port Jervis, 64 App. Div., 268.

Failure to allege presentment of claim in the complaint may be taken advantage of at any stage of the proceedings. Olmstead v. Town of Pound Ridge, 71 Hun, 25; Reining et al. v. City of Buffalo, *supra*.

Some liberality seems to be shown with reference to the *contents* of the notice of claim, and it is held that the notice will be sufficient in respect to its contents if it brings the general nature of the claim to the notice of the supervisor of the town by a general allegation of the defect in the highway, of the nature of the accident and injuries, and of plaintiff's freedom from contributory negligence. Quinn v. Town of Sempronius, 33 App. Div., 70; Spencer v. Town of Sardinia, 42 App. Div., 472; Missano v. Mayor, 160 N. Y., 123; Sheehy v. City of New York, 160 N. Y., 139.

But a letter written by plaintiff's attorney will not be taken as a sufficient statement of the cause of action as required by this section. Borst v. Town of Sharon, 24 App. Div., 599.

It seems that the supervisor cannot waive presentation of the statement required by this section. Borst v. Town of Sharon, 24 App. Div., 599; and see Kennedy v. The Mayor, 34 App. Div., 311.

Miscellaneous cases.

It seems that a city need not be joined in an action against a town to recover for damages due to defects in a highway, even though the negligent commissioners of highways were elected by the inhabitants of a district now embraced within the city which was incorporated after such election. Embler v. Town of Walkill, 132 N. Y., 222.

A telegraph company using a highway must use it subject to the public use, and where it uses it in such a manner as to endanger travelers, it is liable for the resulting damages. Sheldon v. Western Union Telegraph Co., 51 Hun, 591; affd., 121 N. Y., 697; Staring v. Western Union Telegraph Co., 34 N. Y. S. R., 508; 11 N. Y. Supp., 817. See notes to § 104, *post*.

But a telegraph company is not bound to insure the safety of travelers, and where it uses reasonable foresight in selecting, erecting and maintaining its poles, it incurs no liability for resulting damages. Ward v. Atlantic and Pacific Telegraph Co., 71 N. Y., 81.

One who is repairing a highway may be liable for injuries resulting from a dangerous condition created by him, as, for example, leaving the middle of three piles of asphalting materials in a highway without a light(though the two other piles are marked with lights. Reilly v. Sicilian Asphalt Paving Co., 16 Misc., 65. See, also, Wood v. Third Ave. R. R. Co., 91 Hun, 276; affd., 157 N. Y., 696; Coxhead v. Johnson, 20 App. Div., 605; 21 App. Div., 626; 156 N. Y., 680.

And the fact that the highway in question was never established by legal proceedings is not a defense to one who renders it unsafe. Devine v. Brooklyn Heights R. R. Co., 1 App. Div., 237.

Municipal permission to carry on work in a highway affords no defense where the work is negligently done, or necessary precautions are omitted, and if a recovery is had against the municipality, it may recover over against the one causing the defective condition. Village of Port Jervis v. First National Bank, 96 N. Y., 550; Flynn v. N. Y. Elevated R. R. Co., 49 Supr. Ct., 60.

As for liability of abutting owners for repair, negligent condition, etc., of streets or sidewalks, see Tinker v. N. Y., O. & W. R. Co., 157 N. Y., 312; Strumwald v. Schrieber, 69 App. Div., 476; Rohling v. Eich, 23 App. Div., 179; Matthews v. DeGroff, 13 App. Div., 356; Law v. Kingsley, 82 Hun, 76; and § 43, *post*, and notes thereunder; also, Town of Clay v. Hart, 25 Misc., 110, 115; affd., 41 App. Div., 625; City of Rochester v. Campbell, 123 N. Y., 411.

It has been held that counties are not liable for defects in bridges, nor for the negligence of any of their officers, and particularly where the claim has not been presented to them for audit. See Albrecht v. County of Queens, 84 Hun, 399; Ahern v. County of Kings, 89 Hun, 148; Markey v. County of Queens, 154 N. Y., 675.

§ 17. **Action by town against commissioners.**— If a judgment shall be recovered against a town for damages to persons or property, sustained by reason of any defect in its highways, or bridges, existing because of the neglect of any commissioner of highways, such commissioner shall be liable to the town for the amount of the judgment, and interest thereon; but such judgment shall not be evidence of the negligence of the commissioners in the action against him.

Revised from L. 1881, ch. 700, §§ 1-3.

Duty of commissioners to repair, § 4, *ante*.

Liability of town for defects, § 16, *ante*.

As to issuing execution against public officer, see Code Civ. Proc., § 1931.

Of course, a commissioner is not liable for injuries resulting from the negligence of his predecessors in office. Lament v. Haight, 44 How. Prac., 1.

Though a town may be liable for negligence of commissioners whose terms of office have expired. Shaw v. Town of Potsdam, 11 App. Div., 508; Allen v. Town of Allen, 33 App. Div., 463.

That the liability of the commissioner to the town under this section is the test as to the liability of the town to a person injured by a defective highway, see Waller v. Town of Hebron, 5 App. Div., 577, and cases under section 16, *ante*.

Actions by towns against commissioners are seldom, if ever, brought, and if brought, are usually unsuccessful. Lane v. Town of Hancock, 142 N. Y., 510.

§ 18. **Audit of damages without action.**— The town board of any town may audit as a town charge, in the same manner as other town charges are audited, any one claim not exceeding five hundred dollars, for damages to person or property, heretofore or hereafter sustained by reason of defective highways or bridges in the town, if in their judgment it be for the interest of the town so to do; but no claim shall be so audited, unless it shall have been presented to the supervisor of the town, within six months after it accrued, nor if an action thereon shall be barred by the statute of limitations. The town board may also audit any unpaid judgment heretofore or hereafter recovered against a commissioner of highways for any such damages, if such town board shall be satisfied that he acted in good faith, and the defect causing such damage

did not exist because of the negligence or misconduct of the commissioner, against whom such judgment shall have been recovered.

Revised from L. 1881, ch. 700, § 4, and L. 1889, ch. 146.

Liability of town for defective highways, § 16, *ante*.

Presentation of claim as a condition precedent to suit, § 16, *ante*.

Limitation of an action for injury to person from negligence is three years, Code Civ. Proc., § 383, subd. 5.

Limitation of action for injury to property from negligence is six years. Id., § 382, subd. 3.

Audit of town charges generally, Town Law, §§ 162-170.

Audit includes hearing, examining, adjusting and allowing or rejecting. People ex rel. Myers v. Barnes et al., 114 N. Y., 317.

Formerly judgments against commissioners of highways for injuries received from defects in highways resulting from negligence of commissioners could not be audited as town charges. People ex rel. Loomis v. Board of Town Auditors, 75 N. Y., 316.

As a general rule, no claim is obligatory upon or enforceable against a town until properly audited and a town board's decision upon an application for the audit of claims is final until reversed by *certiorari*, and will not be disturbed by *mandamus*. People ex rel. Myers v. Barnes et al., 114 N. Y., 317; but see People ex rel. Slater v. Smith, 83 Hun, 432.

§ 19. **Reports of commissioners.**— The commissioners of highways of each town shall make to the town board, at its meeting held on the Tuesday preceding the biennial town meeting, and on the corresponding date in each alternate year, or, in towns where the biennial town meetings are held at the time of the general election, on the third Tuesday of December in each year a written report stating:

1. The labor assessed and performed;

2. The sum received by them for penalties, commutations and all other sources, and an itemized account of all moneys paid out during the year, with receipts or vouchers in full by the respective parties to whom such money was paid, which account and each and every receipt or voucher is to be filed forthwith with the town clerk of the town, and be open to public inspection during the office hours of such clerk.

3. The improvements which have been made on the highways and bridges, during the year immediately preceding such report,

and the state of such bridges, and the highways in each highway district; they shall also make at the second meeting of said board in each year, a statement of the improvements necessary to be made on such bridges, and the highways in each highway district, and an estimate of the probable expense thereof, beyond what the labor to be assessed in that year will accomplish; a duplicate of which shall be delivered by the commissioners to the supervisor of the town, who shall present such duplicate statement to the board of supervisors, who shall cause the amount so estimated, not exceeding five hundred dollars in any one year, to be assessed, levied and collected in such town, in the same manner as other town charges.

Revised from 1 R. S., ch. 16, tit. 1, art. 1, §§ 3, 4; L. 1884, ch. 396; L. 1873, ch. 395, § 7; amd. L. 1901, chs. 35, 437; subd. 2 amd. L. 1902, ch. 258; in effect March 27, 1902.

For additional matter to be contained in commissioners' report, see § 139, *post.*

Additional report of commissioner, § 187, *post.*

General powers and duties of commissioner, § 4, *ante.*

Dates and proceedings of meetings of town board. Town Law, §§ 160-162.

Money raised by taxation for highway purposes to be paid by tax collector of town to commissioner of highways. Tax Law, § 56; and see § 2, *ante.*

For form of reports under this section, see Nos. 34, 35, *post.*

See People ex rel. Peterson v. Clark, 45 App. Div., 65, in notes to § 10, *ante*, for procedure when appropriations under this section are insufficient.

§ 20. **General duties of overseers.**— Each overseer of highways in every town, shall

1. Repair and keep in order the highways within his district.

2. Warn all persons and corporations assessed to work on the highways in his district, to come and work thereon.

3. Cause the noxious weeds within the bounds of the highway* within his district, to be cut down or destroyed twice in each year, once before the first day of July, and again before the first day of September; and the requisite labor therefor shall be considered highway work.

4. Collect all fines and commutation money, and execute all lawful orders of the commissioners.

*So in the original.

*§ 5. Cause all loose stone lying in the beaten track of every highway within his district, to be removed once in every month, from the first day of April until the first day of December, in each year. Stones so removed shall not be thrown into the gutter, nor into the grass adjoining such highway, but they shall be conveyed to some place, from which they shall not work back or be brought back into the track by the use of road machines or other implements used in repairing such highways. Any person who shall violate the provisions hereof or who shall deposit or throw loose stones in the gutter or grass adjoining a highway or shall deposit or throw upon a highway ashes, papers, stones, sticks, or other rubbish, to the detriment or injury of the public use of, or travel upon such highway, shall be liable to a penalty of ten dollars, to be sued for and recovered by the commissioner or commissioners of highways, or in case of his or their refusal or neglect to act, by any taxpayer of the town in the name of the town in which the offense shall be committed, and when recovered, one-half of the amount shall be applied by them in improving the highways and bridges in such town. The other half shall be paid to the person upon whose written information the action was brought. Any commissioner of highways who shall neglect to prosecute for or join in an action with the other commissioners of highways to recover such penalty, knowing the same to have been incurred, or within twenty days after a sworn statement has been laid before them showing that a party is liable to such penalty, shall be guilty of a misdemeanor.

6. Cause the monuments erected or to be erected, as the boundaries of highways, to be kept up and renewed, so that the extent of such highway boundaries may be publicly known.

Revised from 1 R. S., ch. 16, tit. 1, art. 1, §§ 6, 7; subd. 5, amd. L. 1898, ch. 352; L. 1901, ch. 54; L. 1902, ch. 166, in effect March 14, 1902.

Repairs of highways generally, § 4, subds. 1, 9, *ante*.

Appointment of overseers, § 4, subd. 5, *ante*.

Requiring overseers to warn persons to work, § 4, subd. 6, *ante*.

Duty of overseers to report condition of highways and bridges to commissioners, § 4, subd. 9, *ante*.

* So in the original.

Further duties of overseers, §§ 21-24, 31, 35, 42, 46 and 60-70, 100, *post.*

Overseers forfeit ten dollars for refusal to serve, Town Law, § 55, *post;* and notes to § 22.

Refusal to serve vacates office; commissioner to appoint successor, § 4, subd. 5, *ante.*

Acceptance of list of assessments for highway labor is acceptance of office of overseer, § 34, *post.*

Town officers must take and file an oath of office, Town Law, § 51, page 182, *post.* And while overseers are not always considered town officers, they generally take and file the oath. See, also, Public Officers Law, § 10.

For form of oath of office, see No. 8, *post.*

Noxious weeds generally, §§ 70-71, and notes, *post.* Town Law, § 22, subd. 5, page 180, *post.* Also, County Law, § 12, subd. 7, page 169, *post.*

Supervisors may cause monuments to be erected to locate highways, County Law, § 72, page 176, *post.*

Overseers have no jurisdiction over "county roads," § 58, *post.*

Compensation of oversees, § 24, *post.*

Commutation money of corporations to be paid to commissioner, § 62, *post.*

Power of overseers to procure gravel for repair of highways. L. 1891, ch. 309, page 201, *post.*

All powers and duties of overseers are subject to the control of the commissioners of highways and the overseers are subordinate to them. Bartlett v. Crozier, 17 Johns., 439; Farman v. Town of Ellington, 46 Hun, 41; affd. 124 N. Y., 662; Day v. Day, 94 N. Y., 153.

With respect to bridges the commissioner of highways and not the overseer is the responsible party, and the only liability of the overseer is for a penalty for failure to perform his duty. Bartlett v. Crozier, 17 Johns., 439; Taylor v. Town of Constable, 57 Hun, 371.

And the duty of the overseer to keep highways in order does not relieve the commissioner of highways of his duty to keep both the highways and bridges in repair, and the care of the latter devolves upon the commissioner alone, who should supply both the means and instructions to the overseer for his work. Farman v. Town of Ellington, 46 Hun, 41; affd., 124 N. Y., 662. But see subd. 9 of § 4, *ante*, added by ch. 129, L. 1901, which apparently extends the duties of an overseer to a determination of the necessary repairs required by bridges as well as highways.

An overseer may recover against a town for injuries received from defects in a bridge. Taylor v. Town of Constable, 57 Hun, 371.

Neither overseers nor commissioners are agents of the town; an overseer may not appeal an action arising from his official acts, where the case has been decided adversely to him, nor may he demand indemnity

from the town for his costs. People ex rel. Van Keuren v. Town Auditors, 74 N. Y., 310.

Fines and commutation moneys received by overseers to be expended on highways. Farman v. Town of Ellington, 46 Hun, 41; affd. 124 N. Y., 662.

The overseer should, under liability to a penalty for failure, remove obstructions and perform the various duties mentioned in this section, save warning persons to work, without special order from the commissioner. *Quaere* as to warning to work. (See § 4, subd. 6, *ante*.) McFadden v. Kingsbury, 11 Wend., 667.

§ 21. **Opening obstructed highways.**— Whenever the labor in any district has been worked out, commuted for, or returned to the supervisor, or in those towns that have adopted the money system of taxation for working the highway the money received has been entirely expended, and the highways are obstructed by snow, and notice has been given to the overseer or highway commissioner, in writing, by any two or more inhabitants of the town, liable to payment of highway tax, requesting the removal of such obstruction, the overseer of highways in such district or the highway commissioner of the town shall immediately call upon all persons and corporations liable to highway tax therein, or in the locality where such obstruction exists, to assist in removing such obstructions and such labor so called for by the overseer or highway commissioner shall be assessed upon those liable to perform the same, or in the locality where such obstruction exists, in proportion to their original assessments. And all persons so called out and failing to appear at the place designated by the overseer or the commissioner of highways, or to commute at a dollar a day, within twenty-four hours after due notice, shall be liable to a fine at the rate of one dollar and fifty cents a day for each day's labor they may be required to perform, which fine shall be collectible by the overseer, or highway commissioner, as such, by action in justice's court, and shall be applied to the purposes specified in this section. The overseer and highway commissioner shall be liable to a penalty of five dollars per day, for every day he neglects, without good and sufficient reasons, to have such highway opened without delay after receiving such written notice, the penalty to be collected in justice's court to the person first suing for the same, and the

penalty shall be paid over to the commissioner of highways for the use of the town.

Revised from L. 1868, ch. 791, § 3, and L. 1869, ch. 593; amd. L. 1902, ch. 323, in effect April 2, 1902.

Abatement of taxes for removal of fences to prevent drifting of snow, § 72, *post.*

Obstruction of highways and opening obstructed highways, §§ 104-105, *post.*

Act for raising additional money for removal of fences to prevent drifting of snow, see L. 1890, ch. 291, page 203, *post.*

See notes under §§ 104-105, *post*, for law and practice in cases of obstructions to or encroachments upon highways.

Form of notice, No. 36, *post.*

§ 22. **Penalties against overseers.**— Every overseer of highways who shall refuse or neglect,

1. To warn the persons and corporations assessed to work on the highways, when he shall have been required so to do, by the commissioners or either of them.

2. To collect the moneys that may arise from fines or commutations.

3. To perform any of the duties required by this chapter, or which may be enjoined on him by the commissioners of highways of his town, and for the omission of which no other penalty is provided, shall for every such refusal or neglect, forfeit the sum of ten dollars.

Revised from 1 R. S., ch. 16, tit. 1, art. 1, § 16.

Recovery of penalties generally, §§ 23, 164, *post.*

Overseer liable to penalty of ten dollars for refusal to serve, Town Law, § 55, page 182, *post.*

Under the former act it was held that a person who had incurred the penalty for refusing to serve as overseer could not be again appointed and made liable to a second penalty. Haywood v. Wheeler, 11 Johns., 432.

A person who has been chosen an overseer of highways and entered upon his duties as such, and thereby become an overseer *de facto*, but has never qualified so as to become an overseer *de jure*, cannot be held liable to a penalty for omissions of duty; but he might be liable to a penalty for not accepting the office. Bentley v. Phelps, 27 Barb., 524.

It is the duty of an overseer to remove obstructions whether ordered to do so by the commissioner of highways or not, and in case of his refusal or neglect, he is liable to the penalty. McFadden v. Kingsbury, 11 Wend., 667.

§ 23. **Penalties, how collected.**— The commissioners of highways shall prosecute, in the name of the town, every overseer of highways, for any penalties known to the commissioners to have been incurred by the overseer. They shall also upon the complaint of any resident of the town, that any such penalty has been incurred, prosecute such overseer therefor, if satisfied that the complaint is well founded. The costs and expenses incurred by the commissioners in good faith, in such proceedings, shall be a town charge, to be audited by the town board. If the commissioners refuse or neglect to prosecute for any such penalty, for thirty days after such complaint shall have been made, the complainant may prosecute therefor in the name of the town, upon indemnifying the town for the costs and expenses of such prosecution, in such manner as the supervisor may approve. If the commissioners shall neglect or refuse to prosecute for any such penalty, knowing that the same has been incurred, he shall be liable to a penalty of ten dollars for every such neglect or refusal, to be recovered by action, in the name of the town, brought by the supervisor, or by any taxpayer of the town who may indemnify the town, for the costs and expenses of the action, in such manner as the supervisor may approve.

Revised from 1 R. S., ch. 16, tit. 1, art. 1, §§ 16-18.

For penalties against overseers, see § 22, *ante*.

For recovery of penalties generally, see § 164, *post*.

For list of penalties prescribed by this chapter, see index, subject, "Penalties."

Form of complaint to commissioner, No. 37, *post*.

§ 24. **Compensation of overseers.**— If any overseer shall be employed more days in executing the several duties enjoined upon him by this chapter, than he is assessed to work on the highways, he shall be paid for the excess, at the rate of twelve and a half cents per hour for each day, and be allowed to retain the same out of the money which may come into his hands under this chapter;

but he shall not be permitted to commute for the days he is assessed, nor be entitled to receive any greater sum as compensation, pursuant to this section, than the amount of money in his hands applicable thereto.

Revised from 1 R. S., ch. 16, tit. 1, art. 1, § 13; L. 1880, ch. 308, § 1; amd. L. 1899, ch. 78.

§ 25. **Division of town into highway commissioner districts.**— When a town has determined upon having three commissioners of highways, the town board may at a regular or special meeting thereof divide the town into three highway commissioner districts, and assign one of such districts to each commissioner of highways. Notice of such division, containing a brief and accurate description of the boundaries of each district and the name of the commissioner assigned thereto, shall be published once a week for two successive weeks in a newspaper published in such town, or if no newspaper be published therein, such notice shall be posted in at least six conspicuous places in such town. After a town is divided, the commissioner shall be elected or appointed, so that at all times one commissioner shall reside in each district.

Added by L. 1898, ch. 127, § 1.

Powers of one and three commissioners, § 3, and notes, *ante*.

Powers of commissioners generally, § 4, *ante*.

For form of description of a highway district under this section, see No. 38, *post*.

§ 26. **Duties of commissioner in each district.**— When a town is so divided, the commissioner shall apportion to each district the moneys raised and collected from the town at large for highway purposes and the commissioner assigned to or residing in a district shall expend the money so apportioned to his district upon the highways and bridges situated in or upon the borders thereof. Each commissioner shall cause the highways and bridges in his district to be kept in repair, and shall perform all the duties relating thereto, which the commissioners of highways of the town, except for such division, would perform. His powers and duties as to supervision, repair, construction and improvements of the highways and bridges within his district shall be exclusive.

As to all other powers and duties he shall act in conjunction with the other commissioners.

Added by L. 1898, ch. 127, § 1.
Powers of one and three commissioners, § 3, *ante*.
General powers of commissioners, § 4, *ante*.

ARTICLE II.

ASSESSMENT FOR HIGHWAY LABOR.

Section 30. Meetings of commissioners.
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32. Non-resident lands.
33. Assessments of highway labor, how made.
34. Copies of lists delivered to overseers.
35. Names omitted.
36. Appeals by non-residents.
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39. Tenant to deduct assessment.
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54. Adoption of county road system.
55. County engineer.
56. Apportionment of expenditures for county roads.
57. Bonding county for county roads.
58. Jurisdiction of county roads. Money system to prevail in towns of a county adopting county road system.
59a. Proceeds of county bonds; use of surplus.

§ 30. **Meetings of commissioners.**— The commissioners of highways of each town shall meet within eighteen days after the

annual town meeting, at the town clerk's office, on such day as they shall agree upon, and afterwards at such other times and places as they shall think proper.

Revised from 1 R. S., ch. 16, tit. 1, art. 2, § 20.

As to the time of holding town meetings, see Town Law, § 10, *et seq.*

§ 31. **Lists of inhabitants.**— Each of the overseers of highways shall deliver to the clerk of the town, within sixteen days after his appointment, a list subscribed by him, of the names of all the inhabitants in his highway district, who are liable to work on the highways; and the town clerk shall deliver such lists to the commissioners of highways.

Revised from 1 R. S., ch. 16, tit. 1, art. 2, §§ 21, 23.

As to exemptions from highway labor, see § 33, subd. 2, and notes, *post.*

For form of list required by this section, see No. 39, *post.*

An overseer's failure to deliver to the town clerk a list of inhabitants liable to assessments for highway labor does not deprive the commissioner of power to assess the labor against the persons liable. Rinehart v. Young, 2 Lans., 354.

§ 32. **Non-resident lands.**— The commissioners of highways in each town, before making the assessment of highway labor, shall make out a list and statement, of the contents of all unoccupied lots, pieces or parcels of land within the town, owned by non-residents; every lot so designated, shall be described in the same manner as is required from assessors, and its value shall be set down opposite to the description; such value shall be the same as was affixed to the lot in the last assessment-roll of the town; and if such lot was not separately valued in such roll, then in proportion to the valuation which shall have been affixed to the whole tract, of which such lot shall be a part.

Revised from 1 R. S., ch. 16, tit. 1, art. 2, § 22; and L. 1835, ch. 154, §§ 1, 2; L. 1832, ch. 107, § 1.

For form of list of non-resident lands, see No. 40, *post.*

Highway taxes on lands of non-residents are not assessed, put on the rolls, valued or verified by the assessors. Colman v. Shattuck, 2 Hun. 497; 5 Thomp. & Cook, 34; affd., 62 N. Y., 348; see Fowler v. Westervelt, 17 Abb. Pr., 59; 40 Barb., 374.

As to assessment of non-resident of lands, generally, see Ensign et al. v. Barse et al., 107 N. Y., 329; Chamberlain v. Taylor, 36 Hun, 24; Hampton v. Hamsher, 46 Hun, 144; 124 N. Y., 634, in notes to § 33, *post*.

§ 33. **Assessments of highway labor, how made.**— The commissioners of highways shall, at their first or some subsequent meeting, ascertain, assess and apportion the highway labor to be performed in their town, in the then ensuing year, as follows:

1. The whole number of days work to be assessed in each year, shall be ascertained, and shall be at least three times the number of taxable inhabitants in the town.

2. Every male inhabitant being above the age of twenty-one years (excepting all honorably discharged soldiers and sailors who lost an arm or a leg in the service of the United States, during the late war, or who are unable to perform manual labor by reason of injuries received, or disabilities incurred in such service, members of any fire company formed or created pursuant to any statute and situated within such town, persons seventy years of age, clergymen and priests of every denomination, paupers, idiots and lunatics), shall be assessed at least one day.

3. The residue of such days work, shall be apportioned and assessed upon the estate, real and personal, of every inhabitant of the town, including corporations liable to taxation therein, as the same shall appear by the last assessment-roll of the town, and upon each tract or parcel of land owned by non-residents of the town contained in the list made by the commissioners, excepting such as are occupied by an inhabitant of the town, which shall be assessed to the occupant. The assessment of labor for personal property, must be in the district in which the owner resides, and real property in the district where it is situated, except that the assessment of labor upon the property of corporations, may be in any district or districts of the town, and such labor may be worked out or commuted for, as if the corporation were an inhabitant of the district; but the real property within an incorporated village or city, exempted from the jurisdiction of the commissioners of highways of the town and personal property of an inhabitant

thereof, shall not be assessed for highway labor by the commissioners of highways of the town. Whenever the assessors of any town shall have omitted to assess any inhabitant, corporation or property therein, the commissioners of highways shall assess the same, and apportion the highway labor as above provided.

4. The commissioners shall affix to the name of each person named in the lists furnished by the overseers, and of assessable corporations, and to the description of each tract or parcel of land contained in the list prepared by them of non-resident lands, the number of days which such person or tract shall be assessed for highway labor as herein directed, and the commissioners shall subscribe such lists, and file them with the town clerk.

5. If the commissioners of highways shall neglect for one year, after any highway shall have been laid out, and title thereto acquired, to open or work the same, or any part thereof, and any inhabitant or corporation of the town, in or through which the highway runs, shall give ten days notice to the commissioners of the town, that they desire to apply the whole or any part of their highway labor to the working of such highway, the commissioners shall assign such inhabitants and corporations to such highway district, direct the highway labor for which they are annually assessed to be applied to the same, and cause the same to be worked and put in good order for vehicles and travelers within one year, under the direction of any of such inhabitants, whom such commissioners may appoint as an overseer of the labor so to be applied to such highway; and when the number of days labor assessed in the current year to such inhabitants, as the annual highway tax, is not sufficient to put such highway in good order, the inhabitants and corporations may anticipate the whole or any part of the highway labor assessed, and to be assessed against them, for a period not exceeding three years, but from no one of the districts of the town shall more than one-half of its annual labor be taxed and applied to any highway not embraced in such district.

Revised from 1 R. S., ch. 16, tit. 1, art. 2, §§ 19, 22-24; L. 1835, ch. 154, § 3; L. 1837, ch. 431, § 1; L. 1886, ch. 422, subd. 2; amd. L. 1898, ch. 353.

Overseers to furnish lists of all persons liable to work on roads, § 31, *ante*.

Names omitted by assessors may be added to the lists, § 41, *post.*

Where a town contains a city or a village which is a separate highway district, and contains lands lying partly in the town and partly in such city or village, the part in the town must be valued separately and that part only can be assessed for highway labor. L. 1871, ch. 171.

For separation of personal highway tax and property highway tax in certain cases, see § 38, *post.*

Performance of highway labor generally, §§ 60-74, *post.*

Exemption of officers, attendants, etc., of State asylums from highway labor. L. 1862, ch. 220, § 10.

Assigning abutters to work plank roads or turnpikes. Trans. Corp. L., § 150.

For form of assessment required by this section, see No. 41, *post.*

Form of notice of desire to work upon road under this section, No. 42, *post.* Overseer's road warrant, No. 43, *post.*

No provision is made in subdivision 5 of this section for giving those who perform labor certificates of anticipation, but they should be given in order to avoid confusion. For form of such certificate, see No. 50, *post.*

A highway assessment is not invalid because no number of the road district is given, nor because of the omission of the date of the commissioner's warrant. Ensign et al. v. Barse et al., 107 N. Y., 329.

That aliens may be assessed for highway labor, see Attorneys' General Opinions (1796-1872), p. 570.

Under the statute the commissioner of highways must assess the residue of highway labor as directed, and they have no discretionary power to make corrections in the roll of the preceding year, which they are directed to follow. Hampton v. Hamsher, 46 Hun, 144; aff'd., 124 N. Y., 634; Trustees of the Village of Angelica v. Morse, 56 Barb., 380. See, also, The People v. Pierce, 31 Barb., 138.

And this is so, even though the roll includes or excludes lands lying partly in one and partly in another town, and the commissioners are not liable for the days' labor erroneously assessed against and performed by a person, where he follows the roll, even though the assessment is erroneous. Hampton v. Hamsher, *supra.*

It was held under the former statute that a corporation could be compelled to work out its road tax in any district in the town, regardless of the district in which its property was situated. N. Y., Lake Erie and Western R. Co. v. Supervisors of Delaware Co., 67 How. Pr., 5. And such is now the specific provision of the statute.

The commissioners are required to estimate the whole number of days' work required. Chamberlain v. Taylor, 36 Hun, 24.

§ 34. **Copies of list delivered to overseers.**— The commissioners of highways shall direct the clerk of the town to make copies of such lists, and shall subscribe such copies, after which

they shall cause the several copies to be delivered to the respective overseers of highways of the several districts in which the highway labor is assessed, and the acceptance of the list by any overseer to whom the same may be delivered, shall be deemed conclusive evidence of his acceptance of the office of overseer.

Revised from 1 R. S., ch. 16, tit. 1, art. 2, § 25; L. 1863, ch. 444.
Contents of lists delivered to overseers, §§ 31, 33, *ante.*

§ 35. **Names omitted.**— The names of persons or corporations omitted from any such list, and of new inhabitants, shall from time to time be added to the several lists, and they shall be assessed by the overseers in proportion to their real and personal estate to work on the highways as others assessed by the commissioners on such lists, subject to an appeal to the commissioners of highways.

Revised from 1 R. S., ch. 16, tit. 1, art. 2, § 26.
Form of assessments of omitted persons by overseers, page , *post.*
One who removes from one district to another in the same town is not a new inhabitant, but he may be regarded as a person whose name has been omitted from the list when he owns land in the district to which he removes and has not been assessed for it in the district from which he came. Rinehart v. Yonng, 2 Lans., 354.

§ 36. **Appeals by non-residents.**— Whenever any non-resident owner of unoccupied lands shall conceive himself aggrieved by any assessment of any commissioner of highways, such owner, or his agent, may, within thirty days after such assessment, appeal to the county judge of the county in which such land is situated, who shall, within twenty days thereafter, hear and decide such appeal, the owner or agent giving notice to the commissioners of highways of the time of the hearing before the judge, and his decision thereupon shall be final and conclusive.

Revised from 1 R. S., ch. 16, tit. 1, art. 2, §§ 27, 28.
Method of assessment of non-residents, §§ 32, 33, subds. 3, 4, *ante.*
Assessment of persons omitted by town assessors, § 41, *post.*
Forms of notice and appeal under this section, Nos. 44, 45, *post.*

§ 37. **Credit on private roads.**— The commissioners of highways of each town shall credit to such persons as live on private

roads and work the same, so much on account of their assessments as the commissioners may deem necessary to work such private road, or shall annex the private roads to some of the highway districts.

Revised from 1 R. S., ch. 16, tit. 1, art. 2, § 29.

Creation of highway districts and assignment of highway labor, § 4, subds. 3, 4, *ante*.

Performance of highway labor generally, §§ 60-74, *post*.

Private roads generally, §§ 106-123, *post*.

Duty to credit labor on private roads, etc. Matter of Freeholders of Montezuma, 38 N. Y. S. R., 970; s. c., 14 N. Y. Supp., 845.

§ 38. **Certain assessments to be separate.**— Whenever the commissioners of highways shall assess the occupant, for any land not owned by such occupant, they shall distinguish in their assessment lists, the amount charged upon such land, from the personal tax, if any, of the occupant thereof; but when any such land shall be assessed in the name of the occupant, the owner thereof shall not be assessed during the same year to work on the highways, on account of the same land.

Revised from 1 R. S., ch. 16, tit. 1, art. 2, § 30.

Assessment of highway labor, §§ 31, 33, *ante*.

For form of assessment lists, see No. 41, *post*.

§ 39. **Tenant to deduct assessment.**— Whenever any tenant of any land for a less term than twenty-five years, shall be assessed to work on the highways for such land, and shall actually perform such work, or commute therefor, he shall be entitled to a deduction from the rent due, or to become due from him for such land, equal to the full amount of such assessment, estimating the same at the rate of one dollar per day, unless otherwise provided for by agreement between the tenant and his landlord.

Revised from 1 R. S., ch. 16, tit. 1, art. 2, § 31.

For division of assessments showing what part is against the person and what part is against the property, see § 38, *ante*.

This section entitles a tenant to deduct for performance of highway labor assessed against land only and not for labor assessed against him personally.

§ 40. **Reassessment in case of neglect.**— If it shall appear from the annual return of any overseer of highways, that any person or corporation who was assessed to work on the highways (other than non-residents), has neglected to work the whole number of days assessed, and has not commuted for, or otherwise satisfied such deficiency, the commissioners of highways shall reassess the deficiency to the person so delinquent, at the next assessment for work for highway purposes, and add it to his annual assessment; such reassessment shall not exonerate any overseer of highways from any penalty which he may have incurred under the provisions of this chapter.

Revised from L. 1832, ch. 107, §§ 2, 3.
Assessment lists, generally, §§ 31-33, *ante*.
Form of assessment list, No. 41, *post*.

§ 41. **Omissions of assessors corrected.**— Whenever the assessors of any town shall have omitted to assess any inhabitant or property in their town, the commissioners of highways shall assess the persons and property so omitted, and shall apportion highway labor upon such persons or property, in the same manner as if they had been duly assessed upon the last assessment-roll.

Revised from L. 1837, ch. 431, § 6.

§ 42. **New assessments by overseers.**— When the quantity of labor assessed on the inhabitants of any district by the commissioners of highways, shall be deemed insufficient by the overseer of the district to keep the highways therein in repair, such overseer shall make another assessment on the actual residents of the district, in the same proportion, as near as may be, and not exceeding one-third of the number of days assessed in the same year by the commissioners, on the inhabitants of the district; and the labor so assessed by an overseer, shall be performed or commuted for in like manner, as if the same had been assessed by commissioners of highways.

Revised from 1 R. S., ch. 16, tit. 1, art. 1, § 8.
Form of assessment by overseers under this section, No. 46, *post*.
New assessments may be made by overseers who are appointed by trustees of villages who are made commissioners of highways with power to

appoint such overseers, who are to have same powers as overseers in towns. Weed v. Village of Ballston Spa, 76 N. Y., 329. See Farman v. Town of Ellington, 46 Hun, 41; affd., 124 N. Y., 662.

§ 43. **Sidewalks and trees.**— The commissioners of highways may, by an order in writing duly certified by a majority of them, authorize the owners of property adjoining the highways, at their own expense, to locate and plant trees, and locate and construct sidewalks along the highways in conformity with the topography thereof, which order, with a map or diagram showing the location of the sidewalk and tree planting, certified by the commissioners, shall be filed in the office of the clerk of the town where the highway is located, within ten days after the making of the order.

(R. S., p. 1400, post, p. 917.)*

Revised from L. 1881, ch. 233; L. 1860, ch. 61, § 1; L. 1863, ch. 93; L. 1874, ch. 570, § 1; L. 1876, ch. 340, § 1; 1 R. S., ch. 16, tit. 1, art. 7, § 127.

Abatement of taxes for shade trees, § 44, *post.*

Fallen trees in highways, §§ 102, 103, *post.*

Trees belonging to the abutter, generally, § 156, and notes, *post.*

Form of order under this section, No. 47, *post.*

Penalty for injuring trees along the highway, or around school, or church, or public building, L. 1881, ch. 344; Penal Code, § 639, subd. 5; § 640, subds. 1, 2, 3.

Trees may be planted in the highway where the fee is in the municipality, if the consent of the municipal authorities is obtained and proof that the tree has stood in the highway for over a year, is *prima facie* evidence of municipal sanction. Lane v. Lamke, 53 App. Div., 395.

An abutter on a country road may set out trees along the roadside, and may cultivate or use the roadside in any way to improve or beautify his property, if he does not impair the public easement of passage. Palmer v. Larchmont Electric Co., 6 App. Div., 12; revd. on other points, 158 N. Y., 231.

Sidewalks are part of the highway, and in the absence of statute or contract the abutter is not charged with their care and is not liable for injuries caused by their defects. Law v. Kingsley, 82 Hun, 76; Village of Fulton v. Tucker, 3 Hun, 529; see, also, Clapper v. Town of Waterford, 131 N. Y., 382.

Setting out trees or building a sidewalk within the bounds of a highway as authorized by statute will not found a claim of adverse possession. Bliss v. Johnson et al., 94 N. Y., 235.

* So in the original.

§ 44. **Abatement of tax for shade trees.**— Any inhabitant liable to highway tax, who shall hereafter, pursuant to such an order, transplant by the side of the highway adjoining his premises, any forest shade trees, fruit trees, or any nut bearing trees, suitable for shade trees, shall be allowed by the overseers of highways, or other officer having charge of the highway, in abatement of his highway tax, one dollar for every four trees set out; but all trees must have been set out the year previous to such allowance, and be living and well protected from animals at the time of the allowance, and not further than eight feet from the outside line of any highway three rods wide, and not more than one additional foot further therefrom, for each additional rod in width of highway, and not less than seventy feet apart, on the same side of the highway, if elms, or fifty feet, if other trees; trees transplanted by the side of the highway, in place of trees which have died, shall be allowed for in the same manner. Such abatement of highway tax to any person, shall not exceed one-quarter of his annual highway tax in any one year; but such abatement shall be allowed by the overseers of highways, or other officers having charge of the highway, annually, until it shall have equalled the whole number of trees set out, at the rate herein specified.

Revised from L. 1883, ch. 371.

Trees in highway generally, § 43, *ante*; § 154, *post*.

Fallen trees in highways, §§ 102, 103, *post*.

Abatement of taxes for watering troughs, § 48, *post*.

Abatement of taxes for removal of fences, § 72, *post*.

Abatement of taxes for street lamps, § 73, *post*.

Abatement of taxes for using wide-tire wagons, § 74, *post*.

The State not only invites the abutter on a highway to plant trees, but encourages him to do so by granting to those who do a substantial reduction in their road tax. Palmer v. Larchmont Electric Co., 6 App. Div., 12; revd. on other points 158 N. Y., 231.

§ 45. **Sidewalk tax anticipated.**— The commissioners of highways of any town, may, upon the written application of a majority of the inhabitants in any highway district, subject to assessment for highway labor therein, authorize not more than one-quarter of the highway labor of the district, or of the commutation money received therefor, to be expended under the direction of the over-

seer of highways of the district, in the construction, repairs and improvement of any sidewalks within the limits of the district, and may by writing signed by them, filed with the town clerk, authorize not more than one-fourth of the highway labor of the district, to be anticipated for not more than three years, for constructing, improving or repairing any such sidewalk; and thereupon any person or corporation, assessed for highway labor in the district, may, for such purpose, anticipate his or its assessment for highway labor for the term prescribed by the commissioners, and may perform such labor, under the direction of the overseer within such time, or commute therefor.

Revised from L. 1880, ch. 305, § 1; L. 1884, ch. 479.
Anticipation of highway taxes to open new road, § 33, subd. 5, *ante*.
Sidewalks along highways generally, § 43, *ante*.
Form of application under this section, No. 48, *post*.
Form of permission under this section, No. 49, *post*.

§ 46. **Certificate of anticipation.**— The overseer shall give to such person or corporation, upon the performance of such labor or commutation therefor, a certificate signed by him, showing the number of days labor so anticipated and worked, or commuted for by such person or corporation; and in each succeeding year, upon presentation of such certificate, the person or corporation shall be credited and allowed by the overseer of highways, with the performance of the number of days labor assessed for such year, until the credit shall equal the number of days stated in the certificate to have been anticipated, and shall indorse thereon a statement signed by him showing the credit and allowance.

Revised from L. 1880, ch. 305, § 2.
For form of certificate of anticipation and transfer of same as provided by next section, see Nos. 50, 51, *post*.

§ 47. **Transfer of certificate.**— Such certificate may be transferred to any grantee, upon the voluntary grant of the real property upon which such highway labor is assessable, and if such real property is transferred otherwise than by voluntary grant, it shall be deemed to have been transferred to the person succeeding thereto, and in the hands of any such transferee, it shall have the same effect as when held by the original owner.

Revised from L. 1880, ch. 305, § 3.

For form of transfer under this section, see No. 51, *post.*

§ 48. **Abatement of tax for watering trough.**— The commissioners of highways shall annually abate three dollars from the highway tax of any inhabitant of a highway district, who shall construct on his own land therein, and keep in repair a watering trough beside the public highway, well supplied with fresh water, the surface of which shall be two or more feet above the level of the ground, and easily accessible for horses with vehicles; but the number of such watering troughs in the district, and their location, shall be designated by the commissioners. In a town in which the highways are worked or repaired by the money system of taxation, the commissioners of highways shall annually issue to each person to whom such an abatement is allowed, a certificate specifying the amount thereof.

Revised from L. 1869, ch. 131, § 1, and L. 1872, ch. 274, § 1; amd. L. 1897, ch. 227.

Abatements in towns where money system of taxation prevails are town charges, Town Law, § 180, subd. 8.

For list of abatements of taxes upon various grounds, see notes to § 44, *ante.*

Commissioners of highways may designate places for watering troughs along plank-roads and turnpikes, and any inhabitant maintaining one at the point designated, and in the manner prescribed by the statute is entitled to an annual abatement of three dollars from tolls, and the company is subject to a penalty of twenty dollars for a refusal to allow such abatement, L. 1869, ch. 131, as amended by L. 1872, ch. 274.

§ 49. **System of taxation defined.**— The system of taxation for working and repairing highways, as hereinbefore provided, shall be known as "The Labor System of Taxation," and the system hereinafter provided, shall be known as "The Money System of Taxation."

New.

Cited, Patchen v. Town of Walton, 17 App. Div., 158, 161.

§ 50. **Town may change its system.**— Any town may change its system of taxation for working and repairing its highways, by complying with the following provisions relating thereto.

Revised from L. 1873, ch. 395, § 1.

§ 51. **Vote thereon.**— Upon the written request of twenty-five taxpayers of any town, the electors thereof may, at a special or biennial town meeting vote by ballot upon the question of changing the system of taxation for working the highway; but no person residing in an incorporated village or city, exempted from the jurisdiction of commissioners of highways of the town, shall sign such request, or vote upon such question.

Revised from L. 1873, ch. 395, § 2; amd. L. 1895, ch. 386; L. 1900, ch. 25. Form of request, No. 52, *post*.

§ 52. **When change to take effect.**— When a town shall have voted to change the system of taxation for working and repairing the highways, as herein provided, such change, except in so far as it affects the duties of the town assessors in indicating and placing on the assessment-roll the property and persons subject to assessment and taxation for the repair of highways and of the highway commissioners and town board in determining and certifying the amount of such tax, shall not take effect until the next annual meeting of the board of supervisors, after the town meeting at which it was decided to make the change; and until such annual meeting of the board of supervisors the former system of repairing highways and of taxation therefor shall remain in force in said town; provided, however, that when such change shall have been voted at a town meeting held subsequent to the first day of July in any year, it shall not take effect, except as to the duties required to be performed by the town officers specified herein, until the second annual meeting of the board of supervisors next succeeding such town meeting. In each town of Westchester county such change shall be for a term of not less than five years.

Revised from L. 1873, ch. 395, § 10; L. 1888, ch. 240; amd. L. 1895, ch. 386; L. 1901, ch. 150.

Chapter 60 of the Laws of 1901 provides that in any town which voted on November 6, 1900, to change to the money system of taxation, and in which town the inability or failure of the assessors or supervisors has made it impossible to adopt the change, then such change shall take effect upon the next meeting of the board of supervisors after the passage of said act.

§ 53. **Annual tax under money system; certain villages exempt therefrom.**— Any town voting in favor of the money

system, shall annually raise by tax, to be levied and collected the same as other town taxes, for the repair of the highways, an annual sum of money, which shall be equal to at least one-half the value at the commutation rates, of the highway labor which should be assessable under the labor system; but in any town in which there may be an incorporated village, which forms a separate road district, and wherein the roads and streets are maintained at the expense of such village, all property within such village shall be exempt from the levy and collection of such tax for the repair of highways of such town; and the assessors of such town are hereby required to indicate on the assessment-roll the property included in such incorporated village, in a column separate from that containing a list of the property in the town not included in such village, and shall also place on the assessment-roll the names of all persons liable to poll tax who are residents of such village, and the board of supervisors are directed to levy a tax of one dollar on each person liable to poll tax as thus indicated; but this act shall not apply to assessments made for damages and charges for laying out or altering any road, or for erecting or repairing any bridge in such town. The amount of such tax shall be determined by the commissioners of highway and the town board, who shall certify the same to the board of supervisors, the same as any other town charge. The clerk of the board of supervisors of each county containing a town which has voted for the money system shall, on or before the first day of January of each year transmit to the state comptroller a statement certified by him, and signed and verified by the chairman of such board, stating the name of each town so voting, and the amount of money tax levied therein for the repair of highways during the preceding year. The comptroller shall draw his warrent upon the state treasurer in favor of the treasurer of the county in which such town is situated, for an amount equal to fifty per centum of the amount so levied in each town. The county treasurer shall pay out the amount so paid to him on account of the money tax levied in any such town upon the order of the highway commissioner thereof, to be used by him, for the repair and permanent improvement of such highways therein, and in such manner as the commissioner of highways and town board

may determine. The sum paid by the state to any town by virtue of this section shall not exceed, in any one year, one-tenth of one per centum of the taxable property of such town.

Revised from L. 1873, ch. 395, §§ 3, 4; L. 1874, ch. 169; L. 1889, ch. 259, §§ 1, 2; amd. L. 1893, ch. 412; L. 1898, ch. 351, and L. 1902, ch. 156, taking effect March 14, 1902.

Duty of the commissioner to file contracts for highway labor, etc., L. 1895, ch. 717, page 202, *post.*

Villages form separate road districts, General Village Law (L. 1897, ch. 414), § 141.

By the amendment of 1893 villages are exempt in certain cases from taxes imposed for the repair and maintenance of highways outside their limits, but they are not exempt from charges for laying out or altering highways or erecting or repairing bridges. Matter of Shapter v. Carroll, 18 App. Div., 390.

§ 53a. **Duty of highway commissioners in certain towns.**— In towns where the money system of taxation has been adopted for working highways, it shall be the duty of each owner of lands situated along a highway to cut the noxious weeds and brush growing along the sides of the highway fronting his lands, at least twice in each year, once before the first day of July, and again before the first day of September. If the owner fails to cut such weeds or brush as provided in this section, the commissioner of highways of the town in which such owner resides shall cause the same to be done, and shall give such owner notice in writing stating that at a specified time and place the commissioner will assess the costs thereof against such owner so neglecting, and return the same to the town board of his town at the meeting held on the Thursday next preceding the annual meeting of the board of supervisors, stating the name of each owner, and the amount assessed against him. The town board shall certify the amount of the assessment made by the highway commissioner to the board of supervisors. The board of supervisors shall cause the amount so returned to them by the town board to be levied against such delinquent owner and added to his highway tax for the next ensuing year.

Added L. 1900, ch. 516, see § 70, *post.*

Form of notice, No. 53, *post.*

§ 54. **Adoption of county road system.**— The board of supervisors of any county may, by a vote of a majority of the members thereof, by resolution, adopt the county road system, and shall as soon as practicable after the adoption of such resolution, cause to be designated as county roads, such portions of the public highways in such county as they shall deem advisable, outside of the limits of any city in such county, and shall cause such designation and a map of such county roads to be filed in the clerk's office of such county; the roads so designated shall, so far as practicable, be leading market roads in such county.

Added L. 1893, ch. 333; amd. L. 1895, ch. 375.

For another scheme of county supervision of highways, see §§ 180-189, *post;* also, L. 1890, ch. 555, explained below in notes to this section.

Added L. 1893, ch. 333; amd. L. 1895, ch. 375.

General powers of board of supervisors over highways, County Law, §§ 60-80, pages 169-178, *post.*

Cited in Board of Supervisors v. Phipps, 28 App. Div., 521, and Gaedeke v. Staten Island Midland R. R. Co., 43 App. Div., 514.

That this and the following sections upon this subject may properly be held to apply to counties of over 200 square miles in area, and that all of lesser area are governed by ch. 555 of L. of 1890, see Gaedeke v. Staten Island Midland R. R. Co., 46 App. Div., 219.

§ 55. **County engineer.**— The board of supervisors of any county may appoint a county engineer, who shall be removable at its pleasure. The term of office of each county engineer so appointed shall be three years, unless sooner removed, and his salary shall be fixed by the board of supervisors and be a county charge, except that if he be employed by the state engineer and surveyor in the supervision of the construction of an improved highway pursuant to chapter one hundred and fifteen of the laws of eighteen hundred and ninety-eight, such portion of his salary, during such employment, as shall be allowed by the state engineer and surveyor shall be included as an expense of the cost of construction of such improved highway, and paid in the manner provided by law for the payment of such expenses.

Added L. 1893, ch. 333; amd. L. 1901, ch. 239; L. 1902, ch. 52, in effect February 20, 1902.

See §§ 181, 182, *post.*

§ 56. **[Apportionment of expenditures for county roads.]**—The expense of improving, repairing and maintaining the county roads of each county, shall be a county charge, and in any county in which during the past five years there has been expended at least the sum of five thousand dollars for macadamizing purposes, the expense of constructing, improving, maintaining and repairing such county roads, shall be annually apportioned by the board of supervisors of the county, upon the various towns and cities within the county, as the said board may deem just. The money necessary to improve, repair and maintain the county roads or to pay the principal and interest of any bonds issued as provided in the next section, shall be levied and collected at the same time and in the same manner as money for other county charges is levied and collected. The board of supervisors shall designate the amount of money to be expended upon each county road, and may make rules and regulations for the government of the county engineer and regulating the expenditure of such money.

Added L. 1893, ch. 333. Amd. L. 1895, ch. 375.

Cited in Board of Supervisors v. Phipps, 28 App. Div., 521.

§ 57. **[Bonding county for county roads.]**—The board of supervisors of such county may borrow money from time to time for the construction, maintenance and repair of the county roads in such county, and may issue the bonds or other evidences of indebtedness of the county therefor but such bonds or other evidences of indebtedness shall not bear a rate of interest exceeding five per centum per annum, and shall not be for a longer term than twenty years, and shall not be sold for less than par.

Added L. 1893, ch. 333.

The balance of moneys raised under this section, if any remain, may be used to repair other roads than the particular one in question. Board of Supervisors v. Phipps, 28 App. Div., 521, and see § 59a, *post*.

And such unexpended balance may be used to defray the cost of the construction of a jail, and section 59a does not prevent this. Board of Supervisors v. Phipps, 35 App. Div., 350.

§ 58. **[Jurisdiction of county roads. Money system to prevail in town of a county adopting county road system.]**—The county roads in any county shall be exclusively under the jurisdiction of

the board of supervisors and the county engineer of the county, and exempt from the jurisdiction of the highway officer or officers performing the duty of highway commissioners of the several towns and villages in which such county roads are located. The system of taxation for working and repairing the highways other than the county roads in a town in a county in which the county road system is adopted, shall be the money system of taxation, provided, however, that in the county of Queens, the system as now provided by special act shall be continued.

Added L. 1893, ch. 333. Amd. L. 1895, ch. 375.

Where, under section 91 of the Railroad Law, the consent of the commissioners of highways is necessary to authorize the construction of a railroad on a highway, neither this section nor ch. 555, L. 1890, dispenses with the necessity of obtaining such consent, though the highway be a county road. Gaedeke v. Staten Island Midland R. R. Co., 43 App. Div., 514; 46 App. Div., 219.

§ 59a. **[Proceeds of county bonds; use of surplus.]**— If the proceeds of any county bonds issued for the construction of certain specified highways shall exceed the amount necessary for the construction of said highways, the board of supervisors may, in their discretion, apply such excess or any part thereof to the construction and improvement of other roads already adopted into the county road system; or to the maintenance of the roads for the construction of which said bonds were issued; or to the payment of interest or principal, or both, of said bonds.

Added L. 1898, ch. 641, § 1.

See Board of Supervisors v. Phipps, 35 App. Div., 350, notes to § 57, *ante*.

ARTICLE III.

THE DUTIES OF OVERSEERS OF HIGHWAYS, AND THE PERFORMANCE OF HIGHWAY LABOR.

Section 60. Notice to work.
61. Notice to non-residents.
62. [Commutation.]
63. Teams and implements.
64. Substitutes.
65. Penalties for neglect to work or commute.
66. Assessments for unperformed labor.

Section 67. Penalty for refusal of overseer to provide list.
68. Collection of arrearages for unperformed labor.
69. Annual return of overseers.
70. Noxious weeds in highway.
71. Overseers to notify occupant to remove weeds.
72. Abatement of tax for removal of fence.
73. Abatement of tax for street lamps.
74. Rebate of tax for using wagon tires of certain width.

§ 60. **Notice to work.**— Every overseer of highways shall give at least twenty-four hours notice to all residents of his district, and corporations assessed to work upon the highways therein, of the time and place at which they are to appear for that purpose, and with what teams and implements, and that they will be allowed at the rate of one day for every eight hours of work on the highways, between seven o'clock in the forenoon and six o'clock in the afternoon. The notice to corporations shall be served personally on an agent thereof residing in the town, if any, or if none, by filing the notice in the office of the town clerk, at least five days before the labor shall be required; and any number of days not exceeding fifty, may be required to be performed by any such corporation in any one day.

Revised from L. 1837, ch. 431, § 2; 1 R. S., ch. 16, tit. 1, art. 3, § 32, and L. 1876, ch. 348.

Commissioners of highways must require overseers to warn residents to work, § 4, subd. 6, *ante*.

Duty of overseer to give such warning, § 20, subd. 2, and note below.

Penalty for failure to give such warning and collection thereof, § 22, subd. 1, and § 23, *ante;* § 164, *post*.

What implements, etc., may be required to be brought, § 63, *post*.

Performance of highway labor in Indian lands, Indian Law, §§ 73, 80, 94.

Convict labor on highways, County Law, § 65; L. 1894, chs. 266, 664; L. 1898, ch. 133.

Form of notice to corporation under this section, No. 54, *post*.

Corporation may be required to work in any district of the town, § 33, subd. 3, *ante*.

It is the duty of overseers to give notice to work as provided by statute. Chamberlain v. Taylor, 36 Hun, 24.

§ 61. **Notice to non-residents.**— Every overseer of highways shall give at least five days notice to every resident agent of every

non-resident land-holder, whose lands are assessed, of the number of days such non-resident is assessed, and the time and place at which the labor is to be performed. If the overseer can not ascertain that such non-resident has an agent within the town, he shall file a written notice in the office of the town clerk, at least twenty days before the time appointed for performing such labor, containing the names of such non-residents, when known, and a description of the lands assessed, with the number of days labor assessed on each tract, and the time and place at which the labor is to be performed.

Revised from 1 R. S., ch. 16, tit. 1, art. 3, §§ 33, 34.

See notes to § 60, *supra*.

For form of notice to be served on agent of non-residents, see No. 55, *post*.

For form of notice to non-residents to be filed, see No. 56, *post*.

§ 62. **Commutations.**— Every person and corporation shall work the whole number of days for which he or it shall have been assessed, except such days as shall be commuted for, at the rate of one dollar per day and such commutation money shall be paid to the overseers of highways of the district in which the labor shall be assessed, within at least twenty-four hours before the time, when the person or corporation is required to appear and work on the highways; but any corporation must pay its commutation money to the commissioners of highways of the town, who shall pay the same to the overseers of the districts, respectively, in which the labor commuted for was assessed except in the counties of Rensselaer, Chemung, Onondaga, Columbia, Otsego, Chautauqua, Chenango, Madison, Wayne, Erie, Franklin, Sullivan, Tioga, Saratoga, Broome, Orange, Ontario, Genesee, Essex, Schenectady, Livingston, Schuyler, Monroe, Oneida, Niagara, Orleans, Saint Lawrence, Oswego, Clinton and Jefferson where such commutation money shall be paid on or before the first day of June in each year to the commissioner or commissioners of highways of the town in which the labor shall be assessed, and such commutation money shall be expended by the commissioner or commissioners of highways upon the roads and bridges of the town as may be directed by the town board.

Revised from L. 1837, ch. 431, § 3; L. 1877, ch. 344, §§ 1, 2; L. 1878, ch. 44; 1 R. S., ch. 16, tit. 1, art. 3, §§ 35, 36, as amd. L. 1866, chs. 180, 770, § 1. Amd. L. 1895, ch. 579; L. 1896, ch. 973; L. 1897, ch. 334; L. 1899, ch. 345; L. 1900, ch. 153, and L. 1902, ch. 105, taking effect March 12, 1902.

All money belonging to highway funds or collected for highway purposes should be paid to the treasurer of the commissioners of highways, if any, § 2, *ante*.

As to commutation money of corporations under the former statutes, see Fowler v. Westervelt, 40 Barb., 374; 17 Abb. Pr., 59.

§ 63. **Teams and implements.**— Every overseer of highways may require a team, or a cart, wagon or plow, with a pair of horses or oxen, and a man to manage them, from any person having the same within his district, who shall have been assessed three days or more, and who shall not have commuted for his assessment; and the person furnishing the same upon such requisition, shall be entitled to a credit of three days for each day's service therewith.

Revised from 1 R. S., ch. 16, tit. 1, art. 3, § 37.

As to notice to work generally, see § 60 and notes, *ante*.

§ 64. **Substitutes.**— Every person or corporation assessed to work on the highways, and warned, who does does* not commute therefor, may appear in person or by an able-bodied man as a substitute. A day's labor shall be eight hours of work, and every person or corporation assessed more than one day shall be allowed to work ten hours in each day.

Revised from 1 R. S., ch. 16, tit. 1, art. 3, § 38; L. 1880, ch. 308, § 3.

§ 65. **Penalties for neglect to work or commute.**— Every person or corporation assessed highway labor, who shall not commute, and who shall not appear and work when duly notified, shall be liable to a penalty of one dollars and fifty cents for every day he shall so fail to appear and work; and for wholly omitting to comply with any requisition to furnish a team, cart, wagon, implements and man, he shall be liable to a penalty of five dollars for each day's omission, and for omitting to furnish either a cart, wagon, plow, team or man to manage the team, he shall be liable to a penalty of one dollar and fifty cents for each day's omission; and if any per-

* So in the original.

son shall after appearing, remain idle, or not work faithfully, or hinder others from working, he shall be liable to a penalty at the rate of one dollar and fifty cents a day, for each hour. In those towns in which the money system of taxation has been adopted, any person who is taxed a poll tax for highway purposes as provided in section fifty-three of this chapter, and who does not pay such tax in the manner and at the time, prescribed by law, shall be liable to a penalty of five dollars. The penalties herein imposed, may be recovered by action by the overseer of highways as such, or by the highway commissioner in those towns having no such overseers, and, when collected, shall be expended and disposed of by the overseer or commissioner in the same manner as commutation moneys. The penalties, when recovered, shall be applied in satisfaction of the labor assessed, for omission to perform which, the penalties were respectively imposed. The overseer of highways may excuse any omission to perform labor when required, if a satisfactory reason shall be given therefor; but the acceptance of any such excuse shall not exempt the person excused from commuting for, or working the whole number of days for which he shall have been assessed during the year.

Revised from L. 1837, ch. 431, §§ 4, 5; 1 R. S., ch. 16, tit. 1, art. 3, §§ 39-46; L. 1880, ch. 308, §§ 4-6. Amd. L. 1902, ch. 242, in effect March 26, 1902.

Notice to work generally, § 60 and notes, *ante*.

No one but the overseer can make a complaint against one neglecting to work. Walker v. Moseley, 5 Den., 102.

And it seems that the overseer is the sole judge in respect to imposing the penalty. Bouton v. Nielson, 3 Johns., 474.

A private action will not lie for an error in judgment in adjudging a person in default for not working, and thereby making a complaint against him. Freeman v. Cornwall, 10 Johns., 470; and see Beach v. Furman, 9 Johns., 229.

Money had and received will not lie to recover from an overseer money collected pursuant to the statute for an assessment of highway labor. Potter v. Benniss, 1 Johns., 515.

If the assessment for highway labor were void that fact would be a good defense to an action to recover the prescribed penalty, but a mere error in the assessment not affecting the jurisdiction, would not be a good defense in such an action. Rinehart v. Young, 2 Lans., 354, 360, and see same case in notes to § 35, *ante*.

§ 66. **Assessment for unperformed labor.**— Every overseer of highways shall on or before September first of each year, or at such other time as the board of supervisors may by resolution prescribe, make out and deliver to the commissioner of highways of his town, a list of all persons and corporations who have not worked out, or commuted for their highway assessment, with the number of days not worked or commuted for by each, charging for each day in such a list, at the rate of one dollar and fifty cents per day; and also a list of all the lands of non-residents and persons unknown, which were assessed on his warrant by the commissioners of highways, or added by him, on which the labor assessed has not been performed or commuted for, and the number of days' labor unpaid by each, charging for the same at the rate of one dollar and fifty cents per day, which list shall be accompanied by the affidavit of the overseer, that he has given the notice required, to appear and work, and that the labor specified in the list returned has not been performed or commuted, and it shall be the duty of the commissioner of highways to collect and present such lists to the town board of his town at the meeting held on the Thursday next preceding the annual meeting of the board of supervisors. The town board shall certify the amount of unpaid taxes so returned to them by the commissioner of highways to the board of supervisors.

Revised from 1 R. S., ch. 16, tit. 1, art. 3, §§ 47, 49; L. 1865, ch. 522, § 1; L. 1868, ch. 791, § 4; L. 1870, ch. 461, § 1; as amended. Amd. L. 1898, ch. 350; L. 1901, ch. 437, § 3; L. 1902, ch. 75, § 2, in effect March 4, 1902.

Collection of arrearages for unperformed labor, § 68, *post.*

For form of list required by this section, see No. 59, *post.*

The names "added by him," mentioned in this section, means the omitted and new names added by the overseer pursuant to the provisions of § 35, *ante.*

See Colman v. Shattuck, 2 Hun, 497; affd., 62 N. Y., 348, in notes to § 32, *ante.* See Chamberlain v. Taylor, 36 Hun, 24, for statement according with statute as to overseer's duty as to unperformed labor.

§ 67. **Penalty for refusal of overseer to provide list.**— If any overseer shall refuse or neglect to deliver such list to the commissioner of highways or to make the affidavits herein directed, he shall for every such offense, forfeit the sum of ten dollars and the amount of taxes for labor remaining unpaid at the rate of one

dollar for each day assessed. The commissioner of highways shall, in case of such refusal or neglect, recover such penalty and apply the amount recovered in making and improving the highways and bridges of the delinquent overseer's district.

Revised from 1 R. S., ch. 16, tit. 1, art. 3, § 48; L. 1865, ch. 522, § 2. Amd. L. 1898, ch. 350.

Penalties against overseers generally, §§ 22, 23, *ante*.

Collection of penalties, generally, § 164, *post*.

§ 68. **Collection of arrearages for unperformed labor.**— Each board of supervisors, at its annual meeting in each year, shall cause the amount of such arrearages for highway labor returned to them, estimating each day's labor at one dollar and fifty cents a day, to be levied and collected from the real or personal estate of the person, corporation, or from the non-resident real estate, specified in such list, to be collected by the collectors of the several towns, in the same manner that other town taxes are collected, and shall order the same, when collected, to be paid over to the commissioners of highways of the town wherein the same is collected, to be by them applied toward the construction, repairs and improvement of the highways and bridges in the district in which the labor was originally assessed.

Revised from 1 R. S., ch. 16, tit. 1, art. 3, § 50; L. 1865, ch. 522; § 3; L. 1868, ch. 791, § 5; L. 1870, ch. 461, § 1; L. 1877, ch. 197, § 1.

Presentation of lists for unperformed labor, § 66, *ante*.

See Chamberlain v. Taylor, 36 Hun, 24; Colman v. Shattuck, 2 Hun, 497.

§ 69. **Annual return of overseers.**— Every overseer of highways shall, on the second Tuesday next preceding the time of holding the annual town meeting in his town, within the year for which he is elected or appointed, render to one of the commissioners of highways of the town, an account in writing, verified by his oath, and containing:

1. The names of all persons assessed to work on the highways in the district of which he is overseer.

2. The names of all those who have actually worked on the highways, with the number of days they have so worked.

3. The names of all those from whom penalties have been collected, and the amounts thereof.

4. The names of all those who have commuted, and the manner in which the moneys arising from penalties and commutations have been expended by him.

5. A list of all persons whose names he has returned to the supervisor* as having neglected or refused to work out their highway assessments, with the number of days and the amount of tax so returned for each person, and a list of all the lands which he has returned to the supervisor for non-payment of taxes, and the amount of tax on each tract of land so returned; and he shall then and there pay to the commissioners of highways, all money remaining in his hands unexpended, to be applied by them in making and improving the highways and bridges of the town, in such manner as they shall direct; and if he shall neglect or refuse to render such account, or if, having rendered the same, he shall refuse or neglect to pay any balance which then may be due from him, he shall for every such offense, forfeit the sum of ten dollars.

Revised from 1 R. S., ch. 16, tit. 1, art. 3, §§ 51-53; L. 1865, ch. 522, §§ 4, 5. *List now returned to commissioners, § 66, *ante*.

For form of return, see No. 60, *post*.

The return of the overseer does not become the roll to which the supervisors attach their warrant, but their roll is made up from the various lists returned. Chamberlain v. Taylor, 36 Hun, 24.

§ 70. **Noxious weeds in highway.**— Every person or corporation, owning or occupying, under a lease for one or more years, any lands, abutting upon any highway, shall cause all noxious weeds, briers and brush growing upon such lands within the bounds of the highway, to be cut or destroyed between the fifteenth day of June and the first day of July, and between the fifteenth day of August and the first day of September, in each and every year; but boards of supervisors may fix a different period or periods, for such cutting or destruction in their respective counties. No person shall place or cause to be placed, any noxious weeds, or the seeds of such weeds, within the bounds of any public highway.

Any willful violation of this section, shall subject the person or corporation so offending to a penalty of ten dollars for each offense.

Revised from L. 1878, ch. 49, §§ 1-3. Amd. L. 1899, ch. 681.

Duty of overseers of highways to cut noxious weeds, § 20, subd. 3, *ante*.

Powers of board of supervisors as to noxious weeds, County Law, § 12, subd. 7, page 162, *post*.

Powers of electors of towns as to noxious weeds, Town Law, § 22, subd. 5, page 180, *post*.

Nuisances and noisome substances on or near highway, Penal Code, § 431.

§ 71. **Overseers or commissioners of highways to notify owners or occupants to remove weeds.**— The overseers * of every highway district, or if there is no such overseers,* the commissioners of highways shall give written notice to any owner or occupant of the premises to cut all weeds, briers and brush growing within the bounds of the highways. If the owner of such lands is a non-resident, such notice shall be served personally upon the agent of such non-resident owner residing in the town, or if there is no such agent known to the commissioner or overseer of highways, such notice shall be sent by mail to the last known address of such non-resident owner and a copy thereof shall be filed in the office of the town clerk of the town where the property is situated. If such owner or occupant shall not cut such weeds, briers and brush as so required within ten days after receiving such notice, or within ten days after such notice shall have been served or filed as herein provided, such overseer or commissioner of highways shall do such work, and make a report under oath to the supervisor of the town of the amount expended by him thereon, and the ownership and occupancy of the several parcels of land against which the labor was performed, on or before the first day of November in each year; such supervisor shall certify these statements to the board of supervisors at its next annual meeting, and such board shall include the amounts included in such statements in the taxes assessed upon the lands, upon or against which the labor was performed, the same to be collected with the other taxes,

* So in the original.

and paid over upon the order of the supervisor to the parties entitled thereto.

Revised from L. 1878, ch. 49, § 5; L. 1886, ch. 291, and L. 1887, ch. 604. Amd. L. 1899, ch. 681.

See notes under § 70, *supra*.

§ 72. **Abatement of tax for removal of fence.**— Any inhabitant liable to a highway tax, who shall remove from lands owned or occupied by him, the fence along any public highway, for the purpose of preventing the drifting of snow into such highway, shall be allowed by the overseer of highways, in abatement of his highway tax, the time actually expended in removing such fence, and in replacing the same, pursuant to the directions of the overseer of highways.

Revised from L. 1875, ch. 196, § 1.

As to obstructions of highway by snow, see § 21, *ante*.

For list of abatements of taxes upon various grounds, see notes to § 44, *ante*.

It is provided by ch. 291 of the Laws of 1890 that commissioners of highways may apply in open town meeting for a vote authorizing any sum not exceeding $300 in any one year, to be raised for the purpose of providing wire fencing to be substituted for other fences along the highways, in order to prevent snow blockade of highways, see page 203, *post*.

The removal of highway fences does not affect either the rights of the town or the rights of the abutters. Rozell et al. v. Andrews, 103 N. Y., 150; see Sewell v. City of Cohoes, 11 Hun, 626; affd., 75 N. Y., 45; Matter of Hand Street, 52 Hun, 206.

§ 73. **Abatement of tax for street lamps.**— Any person or corporation owning or holding real estate, or other property liable to highway tax, except in the county of Kings, other than in cities and incorporated villages, who shall, with the consent of the overseer of highways in charge of the district in which such property is assessed, and in such places as he may direct, erect a street lamp, and cause the same to be properly attended to and kept burning during such hours of each night as the overseer of highways may direct, shall be allowed by the overseer of highways, in abatement of such highway tax, six dollars annually, or such

portion of six dollars as the annual highway taxes upon such real estate or other property may be.

Revised from L. 1884, ch. 251, § 1.

For list of abatements of taxes upon various grounds, see notes to § 44, *ante*.

§ 74. **Rebate of tax for using wagon tires of certain width.** — Every person who, during the year ending June first, eighteen hundred and ninety-three and each succeeding year thereafter, uses on the public highways of this state only wagons or vehicles with wheels upon which two or more horses are used the tire of which shall be not less than three inches in width, shall receive a rebate of one-half of his assessed highway tax for each such year, not exceeding, however in any one year the sum of four dollars or four days' labor. The right to such rebate shall not be affected by the use upon the public highways of buggies, carriages or platform spring wagons carrying a weight not exceeding one thousand pounds. Upon making an affidavit showing that he has complied with the provisions of this section during any such year, he shall be credited by the overseer of highways of the road district in which he resides or any road district where he is assessed with such rebate. Such affidavit may be taken before any overseer of highways who is hereby authorized to administer such oath.

Added by L. 1893, ch. 468, § 1.

For list of abatements of taxes, see § 44 and notes, *ante*.

ARTICLE IV.

LAYING OUT, ALTERING AND DISCONTINUING HIGHWAYS, AND LAYING OUT PRIVATE ROADS.

Section 80. Highways by dedication.
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82. Application.
83. Application for commissioners.
84. Appointment of commissioners, and their duties.
85. Notice of meeting.
86. Decision of commissioners in favor of application.
87. Damages in certain cases, how estimated.

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89. Motion to confirm, vacate or modify.
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119. Motion to confirm, vacate or modify.
120. Costs of new hearing.
121. For what purpose private road to be used.
122. Highways or roads along division lines.
123. Adjournments.

§ 80. **Highways by dedication.**— Whenever land is dedicated to a town for highway purposes therein, the commissioners of highways in such town may, either with or without a written application therefor, and without expenses to the town, make an order laying out such highway, upon filing and recording in the town clerk's office with such order a release of the land

from the owner thereof. A highway so laid out must not be less than two rods in width. Section ninety of this chapter does not apply to a highway by dedication. Such commissioners of highways may also, upon written application and with the written consent of the town board, make an order laying out or altering a highway in their town, upon filing and recording in the town clerk's office, with such application, consent and order, a release of all damages from the owners of the lands taken or affected thereby, when the consideration for such release, as agreed upon between such commissioners and owners, shall not in any one case, from any one claimant, exceed one hundred dollars, and from all claimants five hundred dollars. An order of the commissioners as herein provided shall be final.

Revised from L. 1880, ch. 114, §§ 2-4. Amd. L. 1897, ch. 204.

Private laws for laying out, etc., highways. Const., art. 3, § 18, page 167, *post*.

Construction of highways across railroad tracks, L. 1853, ch. 62, page 188, *post*.

Forms for laying out highways upon dedication or release, Nos. 61-67, *post*.

There are four ways of creating highways: By statutory proceedings; by prescription (see § 100, *post*), and by dedication which may be of two kinds, either an offer and implied acceptance or an offer and express acceptance. An offer may be qualified and if accepted *cum onere*, the land becomes a highway subject to the burden. These burdens cannot then be increased, nor can the dedication be revoked. Dedication does not pass title to the land in absence of a conveyance, but gives an easement for highway purposes only. City of Cohoes v. D. & H. C. Co., 134 N. Y., 397; Bowen v. Delaware, L. & W. R. R. Co., 153 N. Y., 476.

Filing maps showing highways may be a dedication of them. Smith v. City of Buffalo, 90 Hun, 118; 159 N. Y., 427; Eckerson v. Village of Haverstraw, 6 App. Div., 102; Matter of Fox Street, 54 App. Div., 479; *contra*, Ludlow v. City of Oswego, 25 Hun, 260; McMannis v. Butler, 49 Barb., 176; 51 Barb., 436.

Dedication may be revoked, if it is not accepted within a reasonable time, and reference to a dedicated highway in subsequent deeds is not a rededication thereof. An order discontinuing an unaccepted dedicated highway is a refusal of it. Matter of Opening Beck Street, 19 Misc., 571; affd., 54 App. Div., 634; Matter of Fox Street, 19 Misc., 571; affd., 54 App. Div., 479.

And what is a reasonable time in which to accept a dedicated highway depends upon the circumstances of each case. Matter of Fox Street, 54 App. Div., 479.

But dedication cannot be revoked after the rights of third parties have vested. City of Buffalo v. D., L. & W. R. R. Co., 68 App. Div., 488.

Nor may dedication be revoked after acceptance. Directing the construction of a sewer through the dedicated highway is an acceptance thereof. As to what shows acceptance generally, see Matter of Hunter, 163 N. Y., 542.

See, as to revocation by co-tenant. McMannis v. Butler, 51 Barb., 436.

Death is a revocation of dedication if it occurs before acceptance. Dedication must be by acts which are unmistakable and decisive. People v. Kellogg, 67 Hun, 546.

The adoption of a plan for a street may constitute an acceptance. Mayor, etc., of New York v. Law et al., 6 N. Y. Supp., 628; affd., 125 N. Y., 380.

As to what does not show acceptance of a dedicated highway, see People v. Livingston, 27 Hun, 105.

Dedication need not be written, but may rest in the acts and declaration of the parties. Cook v. Harris et al., 61 N. Y., 448.

Mere dedication without acceptance does not constitute the dedicated lands a highway. City of Buffalo v. D., L. & W. R. R. Co., 68 App. Div., 488; Palmer v. Palmer, 150 N. Y., 139; Matter of Opening of Beck St., 19 Misc., 571; affd., 54 App. Div., 634; City of Oswego v. Oswego Canal Company, 6 N. Y., 257; Bissell v. N. Y. C. & H. R. R. R. Co., 23 N. Y., 61; Morse v. City of Troy, 38 Hun, 301; and see Raynor v. Syracuse University, 35 Misc., 83; People v. Underhill et al., 144 N. Y., 316.

Nor will mere dedication without acceptance constitute a street so as to make a municipality liable for injuries received through its defective condition. Baldwin v. Jenkins, 1 Week. Dig., 398; see City of Oswego v. Oswego Canal Co., 6 N. Y., 257.

The provisions of a city charter specifying a method of acceptance of land dedicated for highway purposes are not exclusive. Matter of Hunter, 164 N. Y., 365.

A town may take a conveyance of land for highway purposes during a part of the year only and may take such interest in lands as the necessity of the case or the public good may require. Hughes et al. v. Bingham et al., 135 N. Y., 347.

Highways, by dedication, follow a receding shore line of navigable waters, unless a contrary intent appeared in the dedication. Mark v. Village of West Troy, 151 N. Y., 453; Matter of City of Brooklyn, 73 N. Y., 179.

But where the circumstances of the dedication indicate an intent to restrict the street from following the receding shore line the street will not be so extended. Mark v. Village of West Troy, *supra*.

Nor will it follow the receding shore line where it was never laid out to, and never actually extended to the shore line. Matter of City of Yonkers, 117 N. Y., 564.

A commissioner of highways may lay out a highway only by order, and a promise to make such an order is not a sufficient laying out of the highway. Matter of Shawangunk Bridge, 20 Week. Dig., 503; 100 N. Y., 642.

A *cul de sac* may become a highway by dedication. Vandemark v. Porter, 40 Hun, 397; People ex rel. Williams v. Kingman, 24 N. Y., 559.

There must be an intent to dedicate, followed by an abandonment of exclusive enjoyment and an intent to accept, followed by use and appropriation. The intent and evidentiary acts are the essential things. Flack v. Village of Green Island, 122 N. Y., 107.

Both dedication and acceptance may be inferred from long continuous user. Porter v. Village of Attica, 33 Hun, 605; Cook v. Harris et al., 61 N. Y., 448.

Recording is not necessary to constitute the *locus in quo* a highway by dedication. Driggs v. Phillips, 103 N. Y., 77.

The acts of dedication and acceptance must be unequivocal. Vandemark v. Porter, 40 Hun, 397.

A town, in its corporate capacity, has power to take lands for highway purposes by conveyance, voluntary or otherwise. Hughes et al. v. Bingham et al., 135 N. Y., 347; Vail v. Long Island R. R. Co., 106 N. Y., 287.

A vendor under a land contract is the "owner" of the land. Smith v. Ferris, 6 Hun, 553.

§ 81. **Survey.**— Whenever the commissioners of highways shall lay out any highway, either upon application to them or otherwise, they shall cause a survey thereof to be made, and shall incorporate the survey in an order to be signed by them, and to be filed and recorded in the office of the town clerk, who shall note the time of recording the same.

Revised from 1 R. S., ch. 16, tit. 1, art. 1, §§ 55, 56, and L. 1880, ch. 114, §§ 2-4.

For form of order under this section, see Nos. 63, 67, 84, *post*.

Establishing a center line and determining the width on either side of such line is sufficient. People ex rel. Eckerson v. Village of Haverstraw, 47 N. Y. S. R., 891.

And it has been held that the width must be clearly designated in laying out the highway. Matter of Feeney, 20 Misc., 272.

But where the statute prescribes the width, a center line alone is sufficient. Lawton v. Commissioners of Cambridge, 2 Caines, 178; The People v. Commissioners of Salem, 1 Cow., 23; People ex rel. Waters v. Diver, 19 Hun, 263.

And, in the absence of a contrary showing, a single line made by the commissioners will be presumed to be such a center line. The People v. Commissioners of Highways of Red Hook, 13 Wend., 310.

The width may be decreased to less than the legal requirement where the decrease is at the point where a highway by use is adopted as a part of the new highway, and this may be done regardless of the absence of an order adjudging the old road so adopted to be a highway. Snyder v. Plass, 28 N. Y., 465; see Walker v. Caywood et al., 31 N. Y., 51; see § 100, *post.*

And the commissioners cannot determine the width of a highway which is such by use only; the user determines the width in such cases. Talmage v. Huntting, 29 N. Y., 447; and see cases under § 4, subd. 2, *ante,* and under § 100, *post.*

A failure to incorporate the survey in an order is fatal, and a mere survey signed by the commissioners is not an order. Pratt v. The People, 13 Hun, 664.

But the statute is met by attaching the survey to an order referring to the survey and recorded with it. Van Bergen v. Bradley, 36 N. Y., 316.

And it has also been held a sufficient compliance with the statute to file the survey at the same time with an order referring to the road as "according to the survey thereof," where both survey and order are recorded in the same book, there being no doubt as to the survey being the one referred to in the order. McCarthy v. Whalen, 19 Hun, 503; affd. 87 N. Y., 148.

It has been held unnecessary for all of the commissioners to sign the order, but one commissioner may not sign it for another in his absence, even though asked to do so, if so asked before the survey was completed, or the order drawn. Todd v. Todd, 3 Hun, 298; 5 Thomp. & Cook, 531; and see Tucker v. Rankin, 15 Barb., 471; Christy v. Newton, 60 Barb., 332.

Nor need all commissioners be present when the survey is made. Marble v. Whitney, 28 N. Y., 297.

The clerk's act in recording a survey is ministerial. He is not authorized to refuse to record it because of the omission of "Jr." after the signature of a commissioner, nor because a commissioner did not take and file the oath of office. The People v. Collins, 7 Johns., 549.

As to curing an irregularity in laying out a highway by subsequent survey and recording, see Parker v. Van Houten, 7 Wend., 145; Colden v. Thurbur, 2 Johns., 424.

The commissioners need not follow the precise line indicated by the applicant, for he can only indicate the general course of the highway, and a reasonable variance from it will be allowed. Hallock v. Woolsey, 23 Wend., 328; People v. Carman, 69 Hun, 118; People ex rel. Cook v. Hildreth, 1 Silv. Supr. Ct., 358; 24 N. Y. S. R., 458; 5 N. Y. Supp., 308; affd. 126 N. Y., 360; and see Matter of Buel, 168 N. Y., 423, and additional cases under § 86, *post.*

The description may be too indefinite to be effective, and it is so where it describes a highway as commencing "about 25 rods" east from a certain house "at or near the foot of a hill," and passing through a certain

person's land. The description should be such that from it alone the road could be laid out. The order should contain a survey or description of the road sufficient to locate it; though a literal following of section 81 may not be necessary. A survey not incorporated in an order is of no avail upon appeal. Matter of De Camp, 19 App. Div., 564; s. c., 151 N. Y., 557.

But a description by reference to an established highway may be sufficient. The People v. The Commissioners, etc., 37 N. Y., 360.

See, also, for the sufficiency of the description, Woolsey v. Tompkins, 23 Wend., 323; Hallock v. Woolsey, 23 Wend., 327; Tucker v. Rankin, 15 Barb., 471; Johnson v. Loveless, 18 Week. Dig., 49.

Jurisdiction must appear either on the face of the order or *aliunde* and will not be presumed. Miller v. Brown, 56 N. Y., 383.

§ 82. **Application.**— Any person or corporation assessable for highway labor, may make written application to the commissioners of highways of the town in which he or it shall reside, or is assessable, to alter or discontinue a highway, or to lay out a new highway.

Revised from 1 R. S., ch. 16, tit. 1, art 1, § 2, and 1 R. S., ch. 16, tit. 1, art. 4, § 54, and L. 1836, ch. 122, § 1; see L. 1880, ch. 114.

For form of application under this section, see No. 68, *post.*

Laying out highways in Indian reservations. Indian Law, §§ 12, 73, 80.

Discontinuance of highways in certain towns which have expended over $300,000 for macadamizing, L. 1895, ch. 611; L. 1896, ch. 464.

This section does not apply to streets of a village incorporated under the general act. E. B. Co. v. Village of Haverstraw, 142 N. Y., 146; Matter of Livingston St., 82 N. Y., 621.

The Highway Law substantially changes the former procedure. Matter of Lawton, 22 Misc., 426.

Under §§ 145-147 of the General Village Law (ch. 414, L. 1897), the trustees of a village can close a street only at a session of the board. People ex rel. Mershon v. Shaw, 34 App. Div., 61.

A town meeting may not discontinue a highway. Hughes et al. v. Bingham et al., 135 N. Y., 347; Driggs v. Phillips, 103 N. Y., 77.

An application to establish an "old road" as a public highway is not authorized by the statute. Christy v. Newton, 60 Barb., 332.

But an application may include a portion of a highway already in existence and a portion of the new highway may be identical with such old highway. The People v. The Commissioners, etc., 37 N. Y., 360.

An application to lay out a new, and discontinue an old, highway, may be joined, and the invalidity of one proceeding will not invalidate the other. The People v. Robertson, 17 How. Pr., 74.

One may properly apply to have a private road laid out as a public highway. Matter of Burdick, 27 Misc., 298.

The petition must give an accurate description of the proposed highway under the General Village Law. People ex rel. Eckerson v. Trustees, etc., 137 N. Y., 88; but see Matter of Buel, under § 83, *post.*

Failure of the application to show that the applicant is assessable for highway labor is cured by an allegation of that fact in the return of a writ of *certiorari.* People ex rel. Brockway v. Whitney, 17 Week. Dig., 456.

But if the defect is not so cured, it is fatal to the application. Matter of Buel, 168 N. Y., 423; Matter of Pugh, 46 App. Div., 634.

It has been held that objections to the sufficiency of the petition must be taken by motion to set aside order appointing commissioners, and not in the first instance after the merits have been argued. Matter of Pugh, 22 Misc., 43; but see same case, judgment reversed, 46 App. Div., 634.

It has been held that commissioners could lay out a highway, or discontinue one, upon their own motion, and not wait for an application before acting. Gould v. Glass, 19 Barb., 179; The People v. Supervisors of Richmond County, 20 N. Y., 252; Marble v. Whitney, 28 N. Y., 297; People ex rel. Bristol et al. v. Nichols et al., 51 N. Y., 470.

But it is held that they may not make an application for the laying out of a highway under article 4 of the Highway Law. People ex rel. Bevins v. Supervisors, 82 Hun, 298.

Widening a highway is a mere alteration and not the laying out of a new highway. People ex rel. Lasher v. McNeil, 2 Thomp. & Cook, 140; and see on the general principles of difference between altering an old highway and laying out a new one. People ex rel. Bowen et al. v. Jones, 63 N. Y., 306; also Buchholz v. N. Y., L. E. & W. R. R. Co., 71 App. Div., 452.

It seems that where the line of a highway has been changed it will be assumed that the highway as changed is of the same width as before the change. Wakeman v. Wilbur, 147 N. Y., 657.

Act authorizing the taking of the whole of a lot when part only required for the use of a street is unconstitutional. In the Matter of Albany Street, 11 Wend., 149.

§ 83. **Application for commissioners.**— Whenever the land is not dedicated to the town for highway purposes and not released as herein provided, the applicant shall, within thirty days after presenting the application to the commissioners of highways, and after at least five days' notice to said commissioners of the time and place of the application to the county court, in this section provided for, by verified petition showing the applicant's right to so present the same, and that such application has been in good faith presented, and if the county

judge require, on such notice to such parties interested as he shall direct, apply to the county court of the county where such highway shall be, for the appointment of three commissioners to determine upon the necessity of such highway proposed to be laid out or altered, or to the uselessness of the highway proposed to be discontinued and to assess the damages by reason of the laying out, opening, altering or discontinuing of such highway. Such application to the county court shall be accompanied by the written undertaking of the applicant executed by one or more sureties, approved by the county judge, to the effect that if the commissioners appointed determine that the proposed highway or alteration is not necessary or that the highway proposed to be discontinued is not useless, the sureties will pay to the commissioners their compensation at the rate of four dollars for each day necessarily spent and all costs and expenses necessarily incurred in the performance of their duties, which amount shall not exceed the sum of fifty dollars.

Revised from 1 R. S., ch. 16, tit. 1, art. 4, §§ 60, 61, 65, 81; L. 1880, ch. 114; L. 1875, ch. 431; L. 1877, ch. 465; L. 1881, ch. 696, § 1; amd. L. 1894, ch. 334; L. 1897, ch. 344.

Forms of notice, application and undertaking, Nos. 69-72, *post.*

Provision was made by L. 1897, ch. 286, for improving highways in certain towns of eight thousand or more inhabitants. This act was held unconstitutional in Matter of Henneberger, 155 N. Y., 420.

The liability of an unsuccessful applicant to open a highway for the costs of the proceedings is limited by this section and § 88, to fifty dollars, and when he has, by order of the court, paid that amount to the opposing parties, he can not be made to pay an additional amount for commissioners' fees. Patton v. Miller, 28 App. Div., 517.

But where the applicant moves to discontinue the proceedings, the court may, as a condition of allowing such discontinuance, impose the payment of more than ordinary taxable costs. Matter of Trustees of White Plains, 65 App. Div., 417.

An undertaking not bearing the approval of the county judge is defective, but such approval may be given *nunc pro tunc.* Matter of Fanning, 26 App. Div., 627.

The petition required by this section need not show that the land is not dedicated to the town for highway purposes, and has not been released as in this act provided, nor that the application is made within thirty days after an application has been made to the commissioner of highways, but such a petition must be verified and must

show the applicant's right to present it. Matter of Buel, 168 N. Y., 423; *contra*, Matter of Pugh, 46 App. Div., 634.

This and the following sections point out the initiatory steps in all proceedings to lay out new highways. Matter of Taylor and Allen, 8 App. Div., 395.

See, as declaratory of the statute, People ex rel. Knapp v. Keck, 90 Hun, 497; also, People ex rel. Smith v. Allen, 37 App. Div., 248.

§ 84. **Appointment of commissioners and their duties.**— Upon the presentation of such petition, the county court shall appoint three disinterested freeholders, who shall not be named by any person interested in the proceedings, who shall be residents of the county, but not of the town wherein the highway is located, as commissioners to determine the questions mentioned in the last section. They shall take the constitutional oath of office, and appoint a time and place at which they shall all meet to hear the commissioners of highways of the town where such highway is situated, and others interested therein. They shall personally examine the highway described in the application, hear any reasons that may be offered for or against the laying out, altering or discontinuing of the highway, and assess all damages by reason thereof. They may adjourn the proceedings before them from time to time, issue subpoenas and administer oaths in such proceedings, and they shall keep minutes of their proceedings, and shall reduce to writing all oral evidence given before them upon the subject of the assessment of damages. They shall make duplicate certificates of their decision, and shall file one in the town clerk's office of the town, and the other, with such minutes and evidence, in the county clerk's office of the county in which the highway or proposed highway is located.

Revised from 1 R. S., ch. 16, tit. 1, art. 4, §§ 60, 61, 66-69; L. 1845, ch. 180, § 5; L. 1881, ch. 696, § 1.

Many additional cases bearing upon the duties of commissioners under this section will be found in the notes under § 89.

For form of order, notice of appointment, oath of office, appointment of meeting, subpoena and oath of witness required by this section, see Nos. 73-75, 78, 79, *post*.

See, as declaratory of the statute, People ex rel. Knapp v. Keck, 90 Hun, 497.

The requirement that the commissioners take an oath of office is not waived by one who has had neither actual nor constructive notice of its omission. The People v. Connor, 46 Barb., 333.

Technical errors in the admission or rejection of testimony before commissioners may be disregarded. Matter of Pugh, 22 Misc., 43. This case was reversed in 46 App. Div., 634, but doubtless upon the ground that the errors were to be considered more than technical, and the rule stated is probably the correct one.

Relationship does not disqualify a commissioner to act. Matter of Ogden St., 63 Hun, 188.

Commissioners have the right to act upon their own view of the premises as well as upon oral testimony. In the Matter of The New Reservoir, Sheld., 423.

Opponents to the application owning property which will be affected by the discontinuance of a highway, though not abutting upon it, have a right to be heard before the commissioners, and the latter have no authority to oblige such parties to pay for that privilege. Matter of Coe, 19 Misc., 549.

As to surviving commissioners continuing the proceedings after the death of one of their number, see People ex rel. Howlett v. Mayor, 63 N. Y., 291.

§ 85. **Notice of meeting.**— The applicant shall cause, at least eight days previous, written or printed notice to be posted up in not less than three public places in the town specifying, as near as may be, the highway proposed to be laid out, altered or discontinued, the tracts or parcels of land through which it runs, and the time and place of the meeting of the commissioners appointed by the county court to examine the highway as mentioned in the last section. Such notice shall also, in like time, be personally served on the owner and occupant of the land, if they reside in the town, or by leaving the same at their residence with a person of mature age; if they do not reside in the same town, or service cannot be made, a copy of such notice shall be mailed to such owner and occupant, if their post-office address is known to the applicant or ascertainable by him upon reasonable inquiry.

Revised from 1 R. S., ch. 16, tit. 1, art. 4, §§ 59, 62; L. 1845, ch. 180; L. 1873, ch. 69, § 1, and L. 1878, ch. 114.

For form of notice and proof of service thereof, see Nos. 76, 77, *post.*

The required service upon the "occupant" of land means service upon the actual occupant of the surface of the land. People v. Supervisors of Allegany Co., 36 How. Pr., 544.

The word "owner" means the absolute owner of the fee. A vendee under a contract of sale is not such an owner. Smith v. Ferris, 6 Hun, 553; *contra*, Benedict v. Calkins, 45 Hun, 549.

Failure to serve notice on an owner or occupant, as required by this section, is fatal to the proceedings as to him, and the commissioner of highways may raise this objection upon proceedings by mandamus to compel the opening and working of the highway. People ex rel. Smith v. Allen, 37 App. Div., 248; aff'd. 162 N. Y., 615; see also Matter of Pugh, 46 App. Div., 634; People ex rel. Heiser v. Gilon, 121 N. Y., 551; People ex rel. Willis v. Smith, 7 Hun, 17; The People v. Judges of Herkimer Common Pleas, 20 Wend., 186.

Failure of statute to provide for notice of taking of property or ascertaining of damages will render it unconstitutional. People ex rel. Dexter v. Mosier, 56 Hun, 64.

It would seem that technical defects in the notice are not fatal, if the proceedings are properly carried on regardless of such defects. People ex rel. Ludlum v. Wallace, 2 Hun, 152, 4 Thomp. & Cook, 438.

As to failure to properly mail notices and failure of notice generally, see People ex rel. Scrafford v. Stedman, 57 Hun, 280.

A notice and opportunity to be heard will cure such defects generally. Snyder v. Trumpbour, 38 N. Y., 355.

Thus, it was held that a verbal notice was sufficient if the owner actually appeared and contested the application without objection to the sufficiency of his notice. Mohawk & Hudson Railroad Co. v. Artcher, 6 Paige, 83.

Commissioners cannot be compelled to select any particular place for their hearing, but may conduct the hearing at such place as they shall see fit to designate. Matter of Coe, 19 Misc., 549.

Failure to produce proofs of compliance with this section may be supplied and a new application for confirmation be thereafter made. Matter of Fanning, 26 App. Div., 627.

Appearance and failure to object to lack of notice is waiver of failure to notify. People ex rel. Becker v. Burton, 65 N. Y., 452.

§ 86. **Decision of commissioners in favor of application.**—If a majority of the commissioners appointed by the county court shall determine that the highway or alteration applied for is necessary, or that the highway proposed to be discontinued is useless, they shall assess all damages which may be required to be assessed by reason thereof and make duplicate certificates to that effect. If the petition is for the laying out of a highway, the commissioners shall also include in their certificate what the prob-

able cost would be of laying out and completing the proposed highway, in their opinion, based upon the evidence given before them on the hearings.

Revised from 1 R. S., ch. 16, tit. 1, art. 4, § 63; L. 1845, ch. 180, and L. 1880, ch. 114; amd. L. 1901, ch. 441.

For proceedings upon decision of commissioners, see § 89, *post.*

For provisions for carrying out final determination, see § 98, *post.*

For provisions for deduction of benefits from amount of damages, see § 87, *post.* Allowance for additional fencing required, § 122, *post.*

For form of decision under this section, see No. 80, *post.*

For constitutional provisions as to ascertaining compensation for private property taken for public use, see Constitution, art. 1, § 7, page 167, *post.*

Where a public highway is laid out over lands which were already burdened with a private right of way when the present owner acquired them, and he holds subject to that easement, and the burden will not be appreciably increased by the new highway, for which *an easement only* is taken, only nominal damages can be allowed. Matter of Eleventh St., 64 App. Div., 609; Matter of North Fifth St., 64 App. Div., 611; In re Vil. of Olean v. Steyner et al., 135 N. Y., 341; Matter of Adams, 141 N. Y., 297.

But where the *fee* is taken by the public, substantial damages may be awarded. Matter of 173d Street, 78 Hun, 487; Matter of 116th Street, 1 App. Div., 436.

Or if taken for other public purposes than for a highway, nominal damages alone will not be sufficient. Matter of Brooklyn Heights, 48 Barb., 288.

And this right to nominal damages only is applicable to a case where a party sells lands which have been mapped out in lots and streets indicated upon the map, the lots being sold with reference to the map. Livingston v. Mayor of New York, 8 Wend., 85; Wyman v. Mayor of New York, 11 Wend., 486; In the Matter of Furman St., 17 Wend., 649; In the Matter of Thirty-second St., 19 Wend., 128; Matter of Twenty-ninth Street, New York, 1 Hill, 189; Matter of Thirty-ninth Street, New York, 1 Hill, 191; Matter of Lewis St., 2 Wend., 472.

And this is so, even though the map was made by commissioners in partition. The People v. City of Brooklyn, 48 Barb., 211.

A grantee of a portion of lands so plotted, who opens one of the indicated streets to a less width than indicated upon the map, and builds, or pays taxes, upon the reserved strip, is still entitled to nominal damages only for the taking of the reserved portion. In re Extension of North Third Avenue, 3 N. Y. Supp., 641. But see *contra* where the street indicated upon the map was never accepted by the city. Reinhardt et al. v. The City of Buffalo, 39 N. Y. S. R., 304; 15 N. Y. Supp., 844.

A majority decision of the commissioners is sufficient, but all must be present. Babcock v. Lamb & Doty, 1 Cow., 238, and see the specific provision of the section itself.

It *seems* that the certificates must show that all met and deliberated or were duly notified, though a majority may decide and sign the certificate. Chapman v. Swan, 65 Barb., 210; People v. Hinds et al., 27 Barb., 94; 30 N. Y., 470; and see Phillips v. Schumacher, 10 Hun, 405, and notes to § 81, *ante.*

The right to assessment of damages before the highway is opened, worked or used may be waived; what amounts to such a waiver. Chapman v. Gates, 46 Barb., 313; see, also, Supervisors of Erie v. City of Buffalo, 63 Hun, 565.

The decision of the commissioners as to the necessity of laying out a highway is not reviewable collaterally on the ground that one of the petitioners was not a freeholder. Ham v. Silvernail, 7 Hun, 33.

Nor will the commissioners' decision as to the necessity of a highway be reversed unless there is no aspect in which it can be legally sustained. Matter of Burdick, 27 Misc., 298.

Nor may the decision be reviewed for an indefiniteness of description after a lapse of fifty years. Dominick v. Hill, 6 N. Y. S. R., 329; 26 Week. Dig., 239.

Nor may the decision be attacked collaterally for any but jurisdictional defects where it has remained unquestioned for several years. People ex rel. Dady v. Supervisor, 154 N. Y., 381.

But it may be collaterally attacked where it is absolutely void. Miller v. Brown, 56 N. Y., 383.

And the determination is absolutely void if no jurisdiction was obtained. Harrington v. The People, 6 Barb., 607; The People ex rel. Wait v. Eggleston et al., 13 How. Pr., 123.

The award of the commissioners having been confirmed, a property owner seeking to set aside the assessment cannot attack the allowance made another whose lands were taken. Reinhardt et al. v. City of Buffalo, 39 N. Y. S. R., 304; 15 N. Y. Supp., 844, and see Cole v. Trustees of Williamsburg, 10 Week. Dig., 659.

But he may attack the award to another at the time of confirmation. Matter of Thirty-ninth St., New York, 1 Hill, 191.

The institution of proceedings to take lands is a waiver of any alleged dedication of such lands for highway purposes. In re Vil. of Olean v. Steyner et al., 135 N. Y., 341.

Compensation will not be allowed for a building erected after notice by statute of plan to lay out a street upon the site of the building. In the Matter of Furman St., 17 Wend., 649.

But where there was no notice by statute of the intention to lay out the street, and the building in question was erected intermediate the filing of the plan and the opening of the street, it was held that compensation

should be made for the building. Matter of Opening Rogers Ave., 29 Abb. N. C., 361; 22 N. Y. Supp., 27; but see § 90, *post*.

The rule of damages where a portion of a number of lots is taken is the difference between the value of the lot as left and the value of the undiminished area. Matter of Opening Riverside Avenue, 83 Hun, 50.

The commissioners are not bound to follow exactly the route of the petition. Matter of Buel, 168 N. Y., 423; People ex rel. Cecil v. Carman, 69 Hun, 118; *contra*, People ex rel. v. Vil. Whitney's Point, 102 N. Y., 81.

If the commissioners shall decide that a substantial varianee is to be made from the route designated in the petition, they should notify the land owner of such fact before evidence is reeeived upon the question of damages, so that the witnesses can give testimony based on the route the highway is to take. Matter of Feeney, 20 Misc., 272; see notes to § 81, *ante*.

As to when an owner is deprived of his property, see Rehfeldt v. City of Brooklyn, 46 N. Y. S. R., 302; 18 N. Y. Supp., 750; affd. 138 N. Y., 663.

As to compensation to city for taking lands owned by it, see Matter of Ninth Ave. and Fifteenth St., 45 N. Y., 729.

As to measure of damages where a new highway is laid out over an old plank-road, see The People v. Lawrence, 54 Barb., 589.

As to measure of damages under grade crossing act, see Matter of Grade Crossing Comrs., 6 App. Div., 327; Conkling v. N. Y., Ont. & West. Railway Co., 102 N. Y., 107; Rauenstein v. N. Y., L. & W. R. Co., 136 N. Y., 528.

Where one has an easement of thoroughfare only in lands, he sustains no damage when those lands are taken for a public highway. Matter of 116th Street, 1 App. Div., 436.

Where one is both damaged and benefited by the improvement, the net result only need be given. Livingston v. Mayor of New York, 8 Wend., 85; In the Matter of William and Anthony Streets, 19 Wend., 678.

A written agreement with the owners of the land as to amount of their damage may constitute an assessment thereof. People ex rel. Aspinwall v. Supervisors of Richmond, 20 N. Y., 252.

Separate sums as damages should be awarded to lessor and lessee; but if only one sum is awarded the former, the latter may recover from him his proportionate share, and where separate sums are awarded each, the decision is conclusive as between lessor and lessee. Coutant v. Catlin, 2 Sand. Ch., 485, and see Turner v. Williams, 10 Wend., 139.

A widow entitled to dower in the land is entitled to the value of her life-estate and an award thereof to the estate of her late husband is erroneous. In the Matter of William and Anthony Streets, 19 Wend., 678.

Separate awards are required for each of a number of lots, especially where a number of them are already under contract of sale. Matter of Daly, 23 App. Div., 232, and see Lowerre v. Mayor, etc., of N. Y., 46 Hun, 253, and Genet v. City of Brooklyn, 99 N. Y., 296.

And the report of the commissioners may be sent back for an apportionment of the damages assessed. Matter of Daly, 23 App. Div., 232.

When the assessment is completed and filed, the power of the commissioners to assess is exhausted, and any attempt to reassess damages is of no legal effect. People ex rel. Mann v. Mott, 5 Thomp. & Cook, 207; 60 N. Y., 649.

A part only of a road may be discontinued and one end may be bounded by private property. People ex rel. Bristol et al. v. Nichols et al., 51 N. Y., 470.

A highway that has never been opened cannot be discontinued, where there has been no change of circumstances rendering it unnecessary. Matter of the Opening of Beck Street, 19 Misc., 571; affd. 54 App. Div., 634; People ex rel. Miller v. Griswold, 67 N. Y., 59.

But if the original occasion for the road has ceased before it is opened it may be discontinued though never opened. The People ex rel. Clark v. The Com'r of Highways of Town of Reading, 1 Thomp. & Cook, 193; Matter of Fox Street, 54 App. Div., 479.

Before a highway can be discontinued it must be shown to be "useless," not merely unnecessary; nor is it sufficient to warrant discontinuance that a new road somewhere else would be better. Matter of Coe, 19 Misc., 549.

It seems that a conditional discontinuance of a highway is not allowable, as, for example, a discontinuance upon condition that gates be made. If such an order be made, a subsequent order directing that the gates be removed is void. The People v. The Judges of Suffolk, 24 Wend., 249.

A mere resolution of village trustees discontinuing a street and substituting another without application, hearing or release of damages is sufficient, and the village is estopped to still assert control over the street. E. B. Co. v. Village of Haverstraw, 142 N. Y., 146.

Upon the question of the practicability of using another road exclusively, thereby rendering the road in suit useless, it is proper to consider the changes proposed to be made in the former road. People ex rel. Bailey v. Sherman, 15 Hun, 575.

Village trustees can determine to close a street only at a session of the board, and the validity of action taken by previously signing an instrument, which it was pretended had the effect of closing a street, may be challenged by certiorari. People ex rel. Mershon v. Shaw, 34 App. Div., 61.

Owners of private easements in discontinued highways cannot be deprived of their rights without compensation. Matter of The Mayor, 28 App. Div., 143; appeal dismissed, 156 N. Y., 677.

One is entitled to compensation for the discontinuance of a highway which afforded him convenient access to his lot, even though there was still left another means of access thereto. Egerer v. N. Y. C. & H. R. R. R. Co., 39 App. Div., 652; see also Matter of City of Rochester, 24 App. Div., 383; but see *contra* Fearing et al. v. Irwin et al., 55 N. Y., 486.

The action of commissioners in discontinuing a highway does not relate back so as to destroy the cause of action of an abutter for injuries for illegal discontinuance or obstruction. Buchholz v. N. Y., Lake Erie & W. R. R. Co., 148 N. Y., 640; but see Briggs v. Bowen, 60 N. Y., 454, and Drake v. Rogers, 3 Hill, 604, under § 89, *post*.

The commissioners should lay out the highway so that it will be as short as possible, and still serve the public. Matter of Town of East Hampton, 21 App. Div., 623.

§ 87. **Damages in certain cases, how estimated.**— The owner of lands within the bounds of a highway discontinued may inclose the same and have the exclusive use thereof, and the benefits resulting therefrom may be deducted in the assessment of damage caused by the laying out of a highway through his other lands in place of the discontinued highway.

Revised from 1 R. S., ch. 16, tit. 1, art. 4, § 71; L. 1847, ch. 455, § 22; L. 1845, ch. 180, and L. 1880, ch. 114, § 3.

An abutter is not entitled to the land within the bounds of a discontinued highway, unless he owns the land over which the discontinued highway was laid out. Jackson v. Hathaway, 15 Johns., 447.

It would seem that laying out a highway presumptively gives a mere easement of travel, with its incidents and the fee remains in the abutter. Evans v. Board of Street Commissioners, 84 Hun, 206; Trustees of Presb. Society in Waterloo v. The Auburn & Rochester R. R. Co., 3 Hill, 567; Supervisors v. Sea View R. Co., 23 Hun, 180; Jackson v. Hathaway, 15 Johns., 447; Cortelyou v. Van Brundt, 2 Johns., 357; Town of Galen v. Clyde & Rose Plank Road Co., 27 Barb., 543; Fanning v. Osborn et al., 102 N. Y., 441; City of Buffalo v. Hoffeld, 6 Misc., 197.

The law presumes that a grantor who conveys lands bounded upon a public highway does not intend to reserve the fee of the highway in himself. Pell v. Pell, 35 Misc., 472.

"An easement only can be taken unless the statute plainly contemplated and provided for the appropriation of a larger interest," but the legislature has power to authorize the acquiring of a larger interest than a mere easement. Supervisors v. Sea View R. Co., *supra*.

And a grant of land by the legislature to a municipality for highway purposes may carry the fee of the land. DeWitt et al. v. E. T. R. Co., 134 N. Y., 495.

Under the Dutch law the fee of the highway, and not a mere easement, was in the public, and where title is deduced from Dutch patents, it carries a fee, so that a grant from a municipality could carry a fee to such highways after their abandonment as such. Mott v. Clayton, 9 App. Div., 181, distinguishing Mortimer v. New York Elevated R. R. Co., 57 Super. Ct., 244; 25 N. Y. S. R., 872; 6 N. Y. Supp., 898.

As to the fee of streets in New York city, see, also, Matter of Seventeenth St., 1 Wend., 262; Mott v. Mayor of New York, 2 Hilt., 358; The People v. Kerr, 27 N. Y., 188; Matter of Lexington Avenue, 29 Hun, 303; affd. 92 N. Y., 629.

Where an easement only is taken seisin and the right to convey still continue in the owner of the soil. Whitbeck v. Cook, 15 Johns., 483.

And he may use it in any way which will not interfere with the public easement; but he must take care that the highway remains safe for travel. Town of Clay v. Hart, 25 Misc., 110; affd. 41 App. Div., 625.

And in such a case, when the highway is abandoned, the entire and exclusive right to the land, over which it was laid out, reverts to the owner of the soil. Jackson v. Hathaway, 15 Johns., 447.

But public roads constructed by turnpike or other corporations become public property upon their abandonment or the dissolution of the corporation, and become public highways thereafter. People ex rel. Keene v. Supervisors, 151 N. Y., 190; Heath v. Barman, 49 Barb., 496; affd. *sub nom.*, Heath v. Barmore, 50 N. Y., 302. And see § 80 of the County Law, providing that boards of supervisors shall have power, by a two-thirds vote, to provide for the use of abandoned turnpike, plank or macadamized roads within any town as public highways. See L. 1897, ch. 596; L. 1899, ch. 594.

Where the public has a mere right of passage over a highway, one who stands upon the highway and abuses and insults by words the owner of an adjoining lot is guilty of trespass *ab initio*. Adams v. Rivers, 11 Barb., 390.

The owner of the fee of a highway is entitled to one-half the stone removed in digging a sewer trench. Deverell v. Bauer, 41 App. Div., 53.

An abutter is entitled to the lateral support of his land and buildings by the highway as against one who is wrongfully excavating in the highway and may enjoin further excavation and may compel a restoration of the highway. Finegan v. Eckerson, 26 Misc., 574; Milburn v. Fowler, 27 Hun, 568.

But as to the right of lateral support for *buildings*, see Finegan v. Eckerson, 32 App. Div., 233.

The abutter, who owns the fee, may remove the soil from a portion of the highway, if he does not injure the highway, nor affect the freedom of egress or ingress of adjoining owners. Williams v. Kenny, 14 Barb., 629, and see Fisher v. City of Rochester, 6 Lans., 225, and notes under § 15, *ante*.

§ 88. **Decision of commissioners denying application.**— If a majority of the commissioners appointed by county court shall determine that the proposed highway or alteration is not necessary, or that the highway proposed to be discontinued is not useless,

they shall make duplicate certificates to that effect. The costs and expenses necessarily incurred by such commissioners in the proceedings shall be indorsed upon such duplicate certificates, and upon a confirmation of such decision and of the amount of such costs and expenses by the county court, such costs and expenses not exceeding fifty dollars shall be payable by the applicants.

Revised from 1 R. S., ch. 16, tit. 1, art. 4, § 82; amd. L. 1894, ch. 334.

For method of confirmation of commissioner's report, see § 89, *post.*

For cases upon law and procedure under this section, see notes under § 86, *ante.*

As to security for costs and expenses, see § 83, *ante.*

For form of certificate and endorsement of cost and expenses, see No. 81, *post.*

The amount of costs recoverable from an unsuccessful applicant seems to be limited to fifty dollars only, regardless of the fact that commissioners' fees remain unpaid. Patton v. Miller, 28 App. Div., 517.

Proceedings to open a highway may be discontinued upon the application of a village which commenced the proceedings, but more than ordinary costs and disbursements may be required to be paid as a condition of the discontinuance. Matter of Trustees of White Plains, 65 App. Div., 417.

§ 89. **Motion to confirm, vacate or modify.**— Within thirty days after the decision of the commissioners shall have been filed in the town clerk's office, any party interested in the proceeding may apply to the court if in session or to the county judge appointing the commissioners for an order confirming, vacating or modifying their decision, and such court or judge may confirm, vacate or modify such decision. If the decision be vacated, the court or judge may order another hearing of the matter before the same or other commissioners. If no such motion is made, the decision of the commissioners shall be deemed final. Such motion shall be brought on, upon the service of papers upon adverse parties in the proceeding, according to the usual practice of the court in actions and special proceedings pending therein; and the decision of the county court or judge shall be final, excepting that a new hearing may be ordered as herein provided, and excepting that any such decision may be reviewed on appeal upon questions affecting jurisdiction, and rulings and exceptions made and taken upon the

hearing before the commissioners. If the final decision shall be adverse to the applicant, no other application for laying out, altering or discontinuing the same highway shall be made within two years.

Revised from 1 R. S., ch. 16, tit. 1, art. 4, §§ 84-90, and L. 1845, ch. 180; L. 1847, ch. 455, §§ 3, 6, 9; amd. L. 1895, ch. 716; L. 1899, ch. 703.

For costs of this motion, see § 152, *post.*

For form of notice of motion under this section, see No. 82, *post.*

For form of order under this section, see No. 83, *post.*

The decision of the commissioners will not be reversed upon appeal, unless evidence of error is very strong. People ex rel. Stanton v. Horton, 8 Hun, 357, and see Peo. ex rel. Hanford v. Thayer, and Matter of Lawton, *post.*

It has been held that the report should be as final as a verdict. In the Matter of the New Reservoir, Sheld., 423; Matter of Opening Rogers Avenue, 29 Abb. N. C., 361; 22 N. Y. Supp., 27.

New proofs may be presented upon the hearing under this section. Matter of De Camp, 151 N. Y., 557.

An order of commissioners laying out the highway will be vacated where public necessity did not demand it, and a better route could be had, and irreparable injury would result to the relator if the order were not vacated. People ex rel. Wilkinson v. Ireland, 75 Hun, 600.

An order laying out a highway should be set aside where only two or three parties are benefited and the parties remitted to their right to lay out a private road. Matter of Lawton, 22 Misc., 426, and see Matter of Burdick, 27 Misc., 298.

But an order has been sustained where only three farms were reached by the road as laid out. Matter of Town of Whitestown, 24 Misc., 150, and see Matter of Burdick, 27 Misc., 298.

An order laying out the highway may be sustained where the highway, as laid out, is a *cul-de-sac* merely, or where it was prolonged to meet a private road only. Matter of Burdick, 27 Misc., 298; People v. Kingman, 24 N. Y., 559; Matter of Town of Whitestown, 24 Misc., 150.

An order was also sustained where a highway was prolonged to meet a public street. People ex rel. Clinch et al. v. Moore et al., 39 N. Y. S. R., 881; 15 N. Y. Supp., 504; affd. 129 N. Y., 639.

It has been held that the decision of the commissioners will not be vacated because of technical errors in the admission or rejection of testimony. Matter of Pugh, 22 Misc., 43. But this case was reversed in 46 App. Div., 634. The reversal was, doubtless, because the errors were considered to be more than technical, and the rule announced by the lower court is probably the correct one, though its application to that case may have been unwarranted.

The same case holds that the award of damages would not be set aside as against the weight of evidence, where the commissioners had viewed the premises. It was also held that the commissioners were justified in disregarding the owner's plans for the future use of his property in making the award. Matter of Pugh, *supra.*

The County Court has power to review every question on this motion that the Supreme Court could review on certiorari. People ex rel. Hanford v. Thayer, 88 Hun, 136; Matter of Lawton, 22 Misc., 426.

But it cannot be expected to reverse the decision of the commissioners arbitrarily, or except from manifest error. Matter of Town of Whitestown, 24 Misc., 150, and see Matter of Burdick, 27 Misc., 298; and People ex rel. Stanton v. Horton, *supra.*

The decision of the County Court is final upon the necessity of the highway and the compensation of the land to owner, but may be reviewed on the questions of jurisdiction and on the sufficiency of the description of the highway in the order of the commissioners. Matter of De Camp, 151 N. Y., 557; see amendment to statute since this decision.

Confirmation is conclusive as to all matters within the jurisdiction of the commissioners, but not as to other matters. Riker v. Mayor, etc., of New York, 3 Daly, 174.

The decision of the County Court under this section will not be reviewed by certiorari. Matter of Taylor and Allen, 8 App. Div., 395; People ex rel. R. R. Co. v. County Court, 152 N. Y., 214; People ex rel. Hanford v. Thayer, 88 Hun, 136.

Proceedings to open a highway may be discontinued upon the application of a village which commenced the proceedings, but more than ordinary costs and disbursements may be required to be paid as a condition of the discontinuance. Matter of Trustees of White Plains, 65 App. Div., 417.

The reversal of an order discontinuing a highway destroys its effect from the beginning, even to the extent of excusing an alleged trespass meantime. Briggs v. Bowen, 60 N. Y., 454, and see Drake v. Rogers, 3 Hill, 604.

But the action of the public authorities discontinuing a highway cannot relate back so as to destroy the cause of action of an abutter for injuries from an illegal discontinuance or obstruction. Buchholz v. N. Y., Lake Erie & W. R. R. Co., 148 N. Y., 640.

The order of confirmation cannot be attacked in collateral proceedings, where it has been unattacked for several years and no jurisdictional defects are shown. People ex rel. Dady v. Supervisor, 154 N. Y., 381, and see notes under §§ 86 and 105.

An appeal from the order is void where the original proceedings were void for want of jurisdiction. Harrington v. The People, 6 Barb., 607.

But a void order is no bar to a new proceeding. The People ex rel. Wait v. Eggleston et al., 13 How. Pr., 123.

The decision of the commissioners cannot be reviewed in equity for errors in law or want of jurisdiction. Hyatt v. Bates, 40 N. Y., 164.

But it seems that equity may interfere by injunction to prevent the taking of property owned by a railroad company and used by it for station and similar purposes. Pros. P'k & C. I. R. R. Co. v. Williamson et al., 91 N. Y., 552.

Service of notice of an application to review the decision of the commissioners must be made within thirty days after the same shall have been filed in the town clerk's office, but the hearing need not be held before the expiration of that time; and an order erroneously dismissing an application to review as not made in time is appealable. Matter of Glenside Woolen Mills, 92 Hun, 188.

The decision of the County Court is final on the questions of the necessity of the highway and the amount of compensation, but may be reviewed on appeal as to jurisdiction and sufficiency of description of the highway. Matter of De Camp, 151 N. Y., 557; but see provisions of the section itself now allowing review in other cases than those above named.

The question of damages is purely one for the commissioners to decide, and the court has no power to change the amount awarded. See Constitution, art. 1, § 7, *post*, and Matter of Feeney, 20 Misc., 272; People ex rel. Hanford v. Thayer, 88 Hun, 136; Matter of Carpenter, 11 Misc., 690; Matter of Brook Ave., 8 App. Div., 294. See Matter of De Camp, 151 N. Y., 557, *supra*.

But where the determination of the commissioners of estimate and assessment was reached by the application of an erroneous principle, and where such determination is so palpably wrong as to shock the sense of justice, the court will review the findings upon the question of damages. Matter of the Opening of Beck St., 19 Misc., 571; Matter of Forty-eighth St., 19 App. Div., 602.

Matters happening after the laying out of a road cannot present any question upon appeal. People ex rel. Hubbard et al. v. Harris et al., 63 N. Y., 391. But see People ex rel. Martin v. Albright, 14 Abb. Pr., 305; The People v. Goodwin, 5 N. Y., 568.

Neither failure to give notice, nor a departure from the route, are waived by an attorney's appearance and argument of the merits where his authority is not shown. People ex rel. Scrafford v. Stedman, 57 Hun, 280.

The matter may be referred back to a part of the old commissioners sitting with enough new commissioners to make the requisite number. In the Matter of Henry Street, New York, 7 Cow., 400; and see the second sentence of this section.

If part of an appropriation of land is void, the entire report must go back, since material changes may be necessary. In the Matter of John and Cherry Sts., 19 Wend., 659.

An award when confirmed is conclusive against collateral attack, except for jurisdictional defects. In the Matter of Department of Parks, 73 N. Y., 560; People ex rel. Keteltas v. Fitch, 78 Hun, 321.

Where an award is made for damages to leased lands, a part of the damages being awarded to the landlord and a part to the lessee, the award is conclusive as to the share of each. But where the entire damage is awarded to the landlord in ignorance of the lessee's ownership of building, and when it is shown that a certain sum was included in the award for injuries to the building, the lessee may recover that sum. Coutant v. Catlin, 2 Sandf. Ch., 485; Turner v. Williams, 10 Wend., 139.

As to who may be heard upon a motion to confirm. See Matter of Coe, 19 Misc., 549.

A further return by the commissioners cannot be compelled by the County Court pending an appeal to the Appellate Division from an order of the County Court confirming the report of the commissioners. Matter of Baker, 54 App. Div., 21.

Failure of commissioners to designate width of highway as required by section 90 cannot be cured by County Court on motion to confirm made under section 89. Matter of Feeney, 20 Misc., 272.

§ 90. **Limitations upon laying out highways.**— No highway shall be laid out less than three rods in width, nor through an orchard of the growth of four years or more, or any garden cultivated as such for four years or more, or grape vineyard of one or more years' growth, and used in good faith for vineyard purposes, or buildings, or any fixtures or erections for the purposes of trade or manufactures, or any yard or inclosure necessary to the use and enjoyment thereof, without the consent of the owner or owners thereof, unless so ordered by the county court of the county in which the proposed highway is situated; such order shall be made on the certificate of the commissioners of highways of the town or towns in which the proposed highway is situated, showing that the public interest will be greatly promoted by the laying out and opening of such highway, and that commissioners appointed by the court have certified that it is necessary; a copy of the certificate, with eight days' notice of the time and place of the hearing before the county court, shall be served on the owners of the land, or if they are not residents of the county, upon the occupants; the county court upon such certificates, and the proofs and other proceedings therein, may order the highway to be laid out and opened, if it deems it necessary and proper. The commissioners of high-

ways shall then present the order of the county court, with the certificate and proofs upon which it was granted, certified by such court to the general term of the supreme court in the judicial department in which the land is situated, upon the usual notice of motion, served upon the owner or occupant, or the attorney who appeared for them in the county court. If such general term of the supreme court shall confirm the order of the county court, the commissioners of highways shall then lay out and open such highway as in other cases. The provisions of this section shall not apply to vineyards planted, or to buildings, fixtures, erections, yards or inclosures, made or placed on such land after an application for the laying out and opening of the highway shall have been made. In case the highway to be laid out shall constitute an extension or continuation of a public highway already in use, and shall not, as to such new portion, exceed half a mile in length, the commissioners may lay out such extension or continuation, of a width of less than three rods, provided, however, that it be not less than the widest part of the highway of which it is an extension or continuation. In such case the commissioners shall specify in their certificate the precise width of the new portion of such highway, and shall certify that such width is as great at least as the widest part of the highway of which it is a continuation or extension.

Revised from L. 1869, ch. 24, § 1; 1 R. S., ch. 16, tit. 1, art. 4, §§ 57, 58, 80; L. 1873, ch. 773; L. 1875, ch. 482, § 1, subd. 10; L. 1876, ch. 257, § 1; L. 1890, ch. 268; amd. L. 1895, ch. 508.

Form of consents, certificates and orders, hereunder, Nos. 85-89, *post.*

Roads may not be opened through lands of State hospital unless authorized by the legislature. Insanity Law (L. 1896, ch. 545), § 33.

This section does not apply to highways by dedication. § 80, *ante.*

Provision as to confirmation by the General Term of the Supreme Court has not been changed to correspond with the substitution of the Appellate Division for the former General Term.

The proper practice in these cases is to present the question to the county judge upon the certificates of the commissioners and any evidence that they may have taken, virtually retrying the case before the county judge. The hearing before the General Term should be upon the evidence and proceedings before the county judge. The record need not contain all of the precedent steps if the certificates show that the jury has passed

upon the necessity of the highway and there is no allegation of the omission of the necessary precedent steps. Matter of James, 43 Hun, 67.

A road should not be laid out where it is of little advantage to the public and must go through orchards, houses and school-houses. Matter of Four Corner Road, 37 N. Y. S. R., 711; 13 N. Y. Supp., 458.

Nor should a road be laid out through a house and garden when the owner offers a full right of way elsewhere which is but a few rods out of the direct course. Matter of Field, 61 App. Div., 618.

Quaere, as to whether anyone but a person who owns property of the nature specified in this section can oppose the confirmation of an order by the General Term. Matter of Oakley Avenue, 85 Hun, 446.

Failure of commissioners to designate width of highway as required by section 90 cannot be cured by County Court on motion to confirm made under section 89. Matter of Feeney, 20 Misc., 272.

Where three-fourths of a highway has been dedicated or constructed by private subscription, and two dangerous grade crossings were avoided, held that the highway should be laid out, but it seems that the commissioners, however, should first report it to be necessary. Matter of Tappan, 83 Hun, 613.

Land enclosed with, but not used as, a garden may be taken as though not so enclosed; definition of "garden." People ex rel. Stanton v. Horton, 8 Hun, 357; People ex rel. Cooke et al. v. Com. of H'ways, 57 N. Y., 549.

A highway may be laid out through an enclosed plot containing fruit trees, if it does not interfere with the enjoyment of the trees. People v. Judges of Dutchess, 23 Wend., 360.

And whether land is a garden or not is a question of fact for the jury. People v. Moore, 39 N. Y. S. R., 881.

The extension of a yard after a highway has been laid out does not bring the case within the provisions of this section. The People ex rel. Miller v. Comes et al., 1 Hun, 530; 3 Thomp. & Cook, 766. And see the direct provision of this section in the fourth sentence thereof.

Nor will the location of buildings upon the line of a road after it has been laid out have any effect. Carris v. The Commissioners, etc., of Waterloo, 2 Hill, 443; People ex rel. Hubbard et al. v. Harris et al., 63 N. Y., 391; and see the fourth sentence of this section.

A few wild apple trees and cherry trees and two prickly pear trees along the fence do not constitute an orchard. People ex rel. Waterman v. Schellenger et al., 32 N. Y. S. R., 353; 10 N. Y. Supp., 947.

A defendant may justify an assault and battery by showing that he was endeavoring to prevent a highway being laid through his orchard without the necessary preliminary steps being taken. Harrington v. The People, 6 Barb., 607.

The fact that *one* line of a highway passes through an orchard does not violate the provisions of the statute. Snyder v. Trumpbour, 38 N. Y., 355.

It would seem that a yard or enclosure must, in order to be protected, be defined in some way, as by being enclosed, or having visible marks, or being definitely occupied. A ditch conducting water to a mill is not an erection within the section, and may be built over, if a passage be left for the water. The People v. Kingman, 24 N. Y., 559.

Lands occupied by a railroad for a station-house, etc., are within the provisions of the section. Albany Northern R. R. Co. v. Brownell, 24 N. Y., 345; see Pros. P'k & C. I. R. R. Co. v. Williamson et al., 91 N. Y., 552.

But the road bed is not within the protection of this section, nor is a car yard, and a highway may be laid out across them without compensation. L. 1853, ch. 62, p. —, *post;* Pres't, etc., D. & H. C. Co. v. Vil. Whitehall, 90 N. Y., 21; Boston and Albany R. R. Co. v. President, etc., of Village of Greenbush, 52 N. Y., 510.

So of a village or city street. Matter of Folts Street, 18 App. Div., 568; People ex rel. Ithaca v. D., L. & W. R. R. Co., 11 A. D., 280, affd., 159 N Y., 545

Injunction is a proper method to be adopted to prevent the commissioners from taking these forbidden places for highway purposes. Albany Northern R. R. Co. v. Brownell, and Pros. P'k, etc., Co. v. Williamson et al., *supra.*

The word "owner" in the section means the absolute owner, not a vendee under a contract of sale, but the vendor in such a case. Smith v. Ferris, 6 Hun, 553.

Consent may be by a release of damages. McCarthy v. Whalen, 19 Hun, 503; affd., 87 N. Y., 148.

Or it may be by word of mouth. The People ex rel. Martin v. Albright, 14 Abb. Pr., 305; 23 How. Pr., 306.

But a verbal consent may be revoked at any time before it is acted upon, and a revocation was allowed pending an appeal from a refusal of the commissioners to lay out the road. The People v. Goodwin, 5 N. Y., 568.

But if acted upon, the consent cannot be withdrawn. People ex rel. Van Rensselaer v. Van Alstyne, 3 Keyes, 35; 3 Abb. Ct. App. Dec., 575.

Commissioners have no authority to lay out a road under this section until after the confirmation by the General Term. People ex rel. Banner v. Temple, 27 Hun, 128.

As to *certiorari* to review order after confirmation, see People ex rel. Banner v. Temple, 27 Hun, 128, and People ex rel. Beardslee et al. v. Dolge, 45 Hun, 310; affd., 110 N. Y., 680. But see Matter of Taylor and Allen, 8 App. Div., 395, and cases following in notes under § 89, *ante.*

As to opening an old road through an orchard as a highway by use, see Snyder v. Trumpbour, 38 N. Y., 355; Snyder v. Plass, 28 N. Y., 465.

Application for confirmation of order was denied where the papers were not certified as required by § 90, and the undertaking was

not approved as required by § 83, and there was no proof of compliance with § 85, but these several omissions being supplied, a new application may be made. Matter of Fanning, 26 App. Div., 627.

The route specified in the application should be closely followed and landowners notified of any substantial variance. Matter of Feeney, 20 Misc., 272; but see Matter of Buel, 168 N. Y., 423.

Where a commissioner makes a false return to a writ of *certiorari* to review his proceedings in laying out a highway through relator's barn yard, and the relator is damaged thereby he may recover his damages of the commissioner. Beardslee et al. v. Dolge, 143 N. Y., 160.

§ 91. **Laying out highways through burying-grounds.**— No private road or highway shall be laid out or constructed upon or through any burying-ground, unless the remains therein contained are first carefully removed, and properly reinterred in some other burying-ground, at the expense of the persons desiring such road or highway, and pursuant to an order of the county court of the county in which the same is situated, obtained upon notice to such persons as the court may direct.

Revised from L. 1868, ch. 843, § 1.

The Rural Cemetery Act (L. 1847, ch. 133, § 10, as amd. L. 1877, ch. 31) provides, as to the cemetery lands of associations formed under that act, that, so long as they are used for cemetery purposes, "no street, road, avenue or thoroughfare shall be laid out through such cemetery, or any part of the lands held by such association for the purpose aforesaid without the consent of the trustees of such association, except by special permission of the Legislature of the State." See Matter of The Mayor, 23 App. Div., 518.

As to taking a cemetery for park purposes in New York city and for public purposes generally, see Matter of Board of Street Opening, 62 Hun, 499; 133 N. Y., 329, holding that cemetery lands may be taken after the remains are removed and reinterred.

§ 92. **Costs, by whom paid.**— In all cases of assessments of damages by commissioners appointed by the court, the costs thereof shall be paid by the town except when reassessment of damages shall be had on the application of the party for whom the damages were assessed, and such damages shall not be increased on such reassessment, the costs shall be paid by the party applying for the reassessment; and when application shall be made by two or more persons for the reassessment of damages, all persons who may be liable for costs under this section shall be liable in proportion to

the amount of damages respectively assessed to them by the first assessment, and may be recovered by action in favor of any person entitled to the same. Each commissioner appointed by the court, for each day necessarily employed as such, shall be entitled to four dollars and his necessary expenses.

Revised from L. 1845, ch. 180, § 14; L. 1847, ch. 455, §§ 3-12; see L. 1880, ch. 114, § 4. Amd., L. 1897, ch. 344, § 2.

For provisions as to giving security for costs, see § 83, *ante.*

As to auditing costs, see § 93, *post.*

As to costs of motions in highway proceedings, see § 152, *post.*

Where a highway was determined by commissioners to be necessary, but the proceedings failed owing to the lack of the consent or certificate required by section 90, held, that there could be no valid assessment of damages, and the town was not liable for the fees of the commissioners, since the town is liable for such fees only where the proceeding is carried through successfully, otherwise the applicant is chargeable with them. Matter of Miller, 9 App. Div., 260.

The costs provided for in this section are the allowance to the parties under section 152, *post*, and probably the fees and expenses of the commissioners, but do not include the fees of an attorney hired by the commissioner to institute the proceedings. People ex rel. Bevins v. Supervisors, 82 Hun, 298.

§ 93. **Damages assessed, and costs to be audited.**— All damages to be agreed upon, or which may be finally assessed, and costs against the town, as herein provided, shall be laid before the board of town auditors, or in towns not having a board of town auditors, before the town board, to be audited with the charges of the commissioners, justices, surveyors or other persons or officers employed in making the assessment, and for whose services the town shall be liable, and the amount shall be placed upon the town abstract and levied and collected in the town in which the highway is situated, and the money so collected shall be paid to the commissioners of highways of such town, who shall pay to the owner the sum assessed to him, and appropriate the residue to satisfy the charges aforesaid.

Revised from L. 1845, ch. 180, § 7; L. 1847, ch. 455, §§ 3-12, 23; amd. L. 1898, ch. 106.

As to costs generally, see §§ 83, 92, *ante*, and § 152, *post.*

Where damages are awarded to one for whom no damages are provided by the statute, as to one through whose land the highway does

not pass, the supervisors may refuse to audit the claim. The People ex rel. Newton & Kent v. The Supervisors of the County of Oneida, 19 Wend., 102.

The charges of the commissioners, justice, surveyors, etc., mentioned in this section do not include the attorney's fees of the applicant. Eppig v. City of New York, 57 App. Div., 114.

No conditions may be imposed upon the payment of the award. Riker v. Mayor, etc., of New York, 3 Daly, 174.

Where there are not sufficient funds to pay all the awards funds should be raised with all reasonable diligence, and from what funds are available the awards should be paid *pro rata* and not in the order of presentation. And payment *pro rata* may be enforced by action against the one upon whom the duty of payment lies. Sage v. City of Brooklyn, 8 Abb. N. C., 279; affd., 89 N. Y., 189.

The court will not summarily order the payment of the award, save in exceptional cases free from doubt as to consequences. Matter of Lewis, 48 Super. Ct., 536.

Ordinarily awards belong to the owner of the fee of the land at the time the award is made. Conkling v. Zerega, 72 Hun, 134.

One to whom premises are granted before the confirmation of an award is entitled to the award. McGee v. The City of Brooklyn, 3 Misc., 620.

It is not the duty of commissioners to pass upon conflicting and strongly controverted claims of title to property, upon which claims title to the award depends. In the Matter of the New Reservoir, Sheld., 408.

A review may be ordered to determine who is entitled to an award. Matter of Opening Morris St., 19 App. Div., 613; and see Matter of Board of Street Opening, 27 App. Div., 265; affd., 158 N. Y., 721.

Where the method of determining the ownership of funds awarded is provided by the local charter an action against the city will be dismissed where the city has carried out its part of the charter provisions. Patterson v. City of Binghamton, 154 N. Y., 394.

Where one person owns the fee of the land and another owns an easement in it, the two together are owners of the land and are entitled to share the damages paid. Matter of Board of Street Opening, 27 App. Div., 265; affd., 158 N. Y., 721; In the Matter of Opening Eleventh Ave., 81 N. Y., 436.

As to conclusiveness of awards, see People v. Supervisors of St. Lawrence, 5 Cow., 292; Craig v. Supervisors of Orange, 10 Wend., 585.

§ 94. **When officers of different towns disagree about highway.**— When the commissioners of highways of any town, or officers of any village or city having the powers of commissioners of highways, shall differ with the commissioners of highways of

any other town, or with the officers of such a village or city having the powers of commissioners of highways in the same county, relating to the laying out of a new highway or altering an old highway, extending into both towns, or a town and a village or city, or upon the boundary line between such towns or such town and a village or city, or when commissioners of highways of a town in one county, shall differ with the commissioners of highways of a town, or the officers of a village or city having the powers of commissioners of highways, in another county, relating to the laying out of a new highway, or the alteration of an old highway, which shall extend into both counties, or be upon the boundary line between such counties the commissioners of highways of both towns or the officers of the village or city having such powers, shall meet on five days written notice, specifying the time and place, within some one of such towns, villages or cities, given by either of such commissioners, or officers having powers of commissioners of highways, to make their determination in writing, upon the subject of their differences. If they cannot agree, they or either of them may certify to the fact of their disagreement to the county court of that county, if the proposed highway is all in one county, or if in different counties, or if the county judge is disqualified or unable to act, to the supreme court; such court shall thereupon appoint three commissioners, freeholders of the county, not residents of the same town, village or city, where the highway is located; or if between two counties, then freeholders of another county, who shall take the constitutional oath of office, and upon due notice to all persons interested, view the proposed highway, or proposed alteration of a highway, administer all necessary oaths, and take such evidence as they shall deem proper, and shall decide (subject to the approval of the court, as hereinafter provided) all questions that shall arise on the hearing, as to the laying out or altering of such highway, its location, width, grade and character of roadbed, or any point that may arise relating thereto; and if they decide to open or alter such highway, they shall ascertain and appraise the damages, if any, to the individual owners and occupants of the land through which such new or altered highway is proposed to pass, and shall

report such evidence and decision to such court, with their assessment of damages, if any, with all convenient speed. On the coming in of such report, the court may, by order, confirm, modify or set aside the report in whole or in part and may order a new appraisal by the same or other commissioners, and shall decide all questions that may arise before it. And all orders and decisions in the matter shall be filed in the county clerk's office of each county where the highway is located, and shall be duly recorded therein.

Revised from 1 R. S., ch. 16, tit. 1, art. 4, § 72, and L. 1881, ch. 513. Amd., L. 1901, ch. 162.

See L. 1870, ch. 311, for additional provisions on this subject, see page 204, *post.*

For form of notice, certificate of disagreement, orders, etc., under this section, see Nos. 90-93, *post.*

For form of constitutional oath of office, see No. 74, *post.*

For general provisions as to laying out, altering and discontinuing highways, see notes under §§ 80-93, *ante*, which are particularly applicable to proceedings under this section.

The Special Term has no jurisdiction to appoint commissioners until the commissioners of highways have met and certified their disagreement as required by this section. Matter of Barrett, 7 App. Div., 482.

It was held under the former statute that these provisions apply to highways on town lines, as well as those crossing town lines. People ex rel. Titsworth v. Nash, 38 N. Y. S. R., 730; 15 N. Y. Supp., 29; and see § 97, *post.*

The provisions of this section apply to proceedings under § 96, *post.* It seems that an order appointing commissioners from either of the interested towns, or from either of the interested counties, where the highway is in different counties, should be set aside. An order made at a Special Term under this section is appealable. Matter of Barrett, 7 App. Div., 482; but *contra* as to order of County Court. Matter of Taylor & Allen, 8 App. Div., 395; and see People ex rel. R. R. Co. v. County Court, 4 App. Div., 542.

Where the description of the highway given in the certificate of disagreement unmistakably indicates the highway intended, it will be sufficient, regardless of apparent inconsistencies. People ex rel. Titsworth v. Nash, 38 N. Y. S. R., 730; 15 N. Y. Supp., 29.

§ 95. **Difference about improvements.**— When the commissioners of highways of a town, or the officers of a village or city having the powers of commissioners of highways therein, shall

desire to make a new or altered highway extending beyond the bounds of such town, village or city, a better highway than is usually made for a common highway, with a special grade or road-bed, drainage or improved plan, and are willing to bear the whole or a part of the expense thereof beyond such bounds, but cannot agree in regard to the same, upon written application of either of the commissioners or officers, and notice to all parties interested, such court shall make an equitable adjustment of the matters, and may direct, that in consideration of the payment of such portion of the additional expense by the town, village or city that desires the improved and better highway, as shall be equitable, its officers, contractors, servants and agents may go into such town, village or city, and make the grade and road-bed, and do whatever may be necessary and proper for the completion of such better highway, advancing the money to do it; the amount of damages to each owner or occupant, shall be ascertained and determined by commissioners, who shall be appointed, and whose proceedings shall be conducted in the manner provided by the last preceding section; and upon the coming in of their report of damages, and of the expenses paid, such court shall, on notice to all parties interested, direct that the amount of damages assessed to each owner or occupant, if any, and all such expenses be paid by each, any or all of such towns, villages or cities as shall be just and equitable, and the damages and expenses assessed and allowed, as in this and the last preceding sections, shall be paid and collected as if fixed by the commissioners of highways of the towns, or the officers of such villages or cities having the powers of such commissioners. Every commissioner appointed as herein provided, shall be paid six dollars for each day actually and necessarily employed in such service and necessary expenses.

Revised from 1 R. S., ch. 16, tit. 1, art. 4, § 72, and L. 1881, ch. 513.
Forms under this section, No. 94, *post.*

§ 96. **Highway in two or more towns.**— When application is made to lay out, alter or discontinue a highway located in two or more towns, all notices or proceedings required to be served upon the commissioners of highways, shall be served upon the commissioners of highways of each town; and the commissioners

appointed by the court, shall determine the amount of damages to be paid by each town, and when the towns are in different counties, the application for the appointment of commissioners shall be made to a special term of the supreme court held in the district where the highway or some part of it is located; and the same proceedings shall thereafter be had in the supreme court of such district as are authorized by this chapter to be had in the county court.

New.

An application may be made under this section by a person assessable in either town. The only notice of proceeding that need be served on the commissioner is the application to lay out the highway. People ex rel. Knapp v. Keck, 90 Hun, 497, but see § 83, *ante*.

And the petition need not ask that the highway be laid out in each of the two towns. Matter of Burdick, 27 Misc., 298.

The commissioners must certify a disagreement, as provided in section 94, in order to give the court jurisdiction, and the provisions of section 94 are applicable to proceedings under this section. Matter of Barrett, 7 App. Div., 482.

It seems that an order appointing residents of either county, when the towns are in different counties, should be set aside, and an order made at Special Term under this section is appealable. Matter of Barrett, *supra*.

Application should be made to Special Term of Supreme Court where highway is in two counties. Matter of Taylor & Allen, 8 App. Div., 395.

§ 97. **Laying out, dividing and maintaining highway upon town line.**— An application to lay out a highway upon the line between two or more towns shall be made to the commissioners of highways of each town, who shall act together in the matter; and, upon laying out any such highway, they shall divide into two or more highway districts, in such manner that the labor and expense of opening, working and keeping the same in repair through each of such districts may be equal, as near as may be, and to allot an equal number of the districts to each of the towns; each district shall be considered as wholly belonging to the town to which it shall be allotted, for the purpose of opening and improving the highway and for keeping it in repair; and the commissioners of highway shall cause the highway and the partition and allotment thereof to be recorded in the office

of the town clerk in each of the respective towns. If such highway be upon a line between one or more towns and a city or incorporated village, such application shall also be made to the officers of such city or village having the powers of commissioners of highways, and such officers may agree with the highway commissioners of such towns as to the division of the labor and expense of opening, working and maintaining such highway. Whenever such officers shall disagree as to such division, application may be made for the appointment of commissioners, and the same procedure shall be had as is prescribed in this article for the settlement of disagreements between the highway officers of different towns. All highways heretofore laid out upon the line between any two towns or between a town and a city or an incorporated village shall be divided and allotted or redivided and reallotted, recorded and kept in repair, in the manner above directed.

Revised from 1 R. S., ch. 16, tit. 1, §§ 4, 73-76. Amd. L. 1894, ch. 727; L. 1895, ch. 181.

For another scheme for joint maintenance, see L. 1870, ch. 311, page 204, *post.*

As to general provisions for laying out a highway, see the preceding sections of this chapter and notes thereunder; also the following sections of this chapter and notes thereunder.

Repair of highways generally, §§ 4, 20, *ante.*

For form of allotment, etc., under this section, see No. 93, *post.*

Where a road lying upon a town line has been apportioned by the commissioners of the towns, the jurisdiction over the several parts is thereafter in the respective commissioners of highways. Tifft et al. v. Alley, 3 Thomp. & Cook, 784.

A town is not liable for injuries sustained by reason of defects in the portion which was allotted to the other town. Where there is an omission to apportion such highway, a previous apportionment will remain in force. Jones v. City of Utica, 16 Hun, 441.

It is not necessary to record an apportionment to give it validity. Jones v. City of Utica, *supra.*

The division is made both for the purpose of opening and of maintaining the road, but has no reference to bridges, they not being included in the term "roads." Day v. Day, 94 N. Y., 153; and see § 130 *et seq, post; contra,* Tifft et al. v. Alley, *supra.*

§ 98. **Final determination, how carried out.**— The final determination of commissioners appointed by any court, relating

to the laying out, altering or discontinuing a highway, and all orders and other papers filed or entered in the proceedings, or certified copies thereof from the court where such determination, order and papers are filed and entered, shall be forthwith filed and recorded in the town clerk's office of the town where the highway is located; and every such decision shall be carried out by the commissioners of highways of the town, the same as if they had made an order to that effect.

New in form; see 1 R. S., ch. 16, tit. 1, art. 4, § 83; L. 1880, ch. 114, § 2.

For general provisions as to determination of commissioners, see §§ 86-88, *ante*.

As to survey and order laying out the highway by commissioners, see § 81, *ante*. Form No. 84, *post*.

General provisions for filing papers, § 150, *post*.

Where the original record of the proceedings is void, the laying out of the highway is void, and jurisdiction must appear either on the face of the papers or by proof *aliunde*. Miller v. Brown, 56 N. Y., 383.

An omission to file the petition with the other papers does not affect the regularity of the proceedings. Commissioners of Highways of Bushwick v. Meserole, 10 Wend., 122.

But its filing may be compelled by attachment against the commissioner who has possession of it. The People v. Vail, 1 Cow., 589; 2 Cow., 623.

The laying out of a highway after the determination of the jury will not be enforced by *mandamus*, where it appears that the public will derive no benefit from it. People ex rel. Ashley v. Comrs. of Highways, 42 Hun, 463.

Nor where notice has not been given as required by section 85, see notes to that section, *ante*.

Nor where it appears that the proceedings were void because of jurisdictional defects. People ex rel. Johnson v. Whitney's Point, 32 Hun, 508; affd., 102 N. Y., 81; and see People ex rel. Allen v. Smith, 37 App. Div., 248, under § 85, *ante*.

Mandamus may be instituted to compel the commissioners to open a road as laid out. The People v. Champion, 16 Johns., 61.

But the fact that the damages have not been released or assessed is a good defense. People ex rel. Clark v. The Comrs. of Highways of Town of Reading, 1 Thomp. & Cook, 193.

But see Case v. Thompson, 6 Wend., 634, holding that the assessment or payment of damages is not a condition precedent to opening the road.

And the right to have damages assessed may be waived; as to what constitutes waiver. Chapman v. Gates, 46 Barb., 313.

An order discontinuing part of a highway previously ordered opened, the later order being made before the highway was actually opened, does not relieve the commissioners from opening that portion of the highway to which the order of discontinuance had no reference. *Ex parte* Sanders, 4 Cow., 544.

But see Matter of Opening of Beck St. and cases following in notes to § 86, *ante*, as to the validity of an order discontinuing an unopened road.

The commissioner of highways has no part or duty in the proceedings to lay out a highway until it becomes his duty under this section to lay it out, after which he has general charge of it. People ex rel. D., L. & W. R. Co. v. County Court, 92 Hun, 13; but see People ex rel. Bevins v. Supervisors of Warren, 82 Hun, 298, 302; and the provision of § 83, *ante*, for notice to the commissioners of highways of the application to the County Court for commissioners.

§ 99. **Highways abandoned.**— Every highway that shall not have been opened and worked within six years from the time it shall have been dedicated to the use of the public, or laid out, shall cease to be a highway; but the period during which any action or proceeding shall have been, or shall be pending in regard to any such highway, shall form no part of such six years; and every highway that shall not have been traveled or used as a highway for six years, shall cease to be a highway. The commissioners of highways shall file, and cause to be recorded in the town clerk's office of the town, written description, signed by them, of each highway so abandoned, and the same shall thereupon be discontinued.

Revised from 1 R. S., ch. 16, tit. 1, art. 4, § 99; L. 1853, ch. 174, § 15; L. 1861, ch. 311, §§ 1, 2. Amd. L. 1899, ch. 622.

For form of description required by this section, see No. 95, *post*.

Discontinuance of highways in towns which expended upwards of $300,000 in five years prior to 1895. L. 1895, ch. 611; L. 1896, ch. 464.

It was held that the former analogous statute, which this section supercedes, applied to all highways, regardless of their antiquity. Townsend v. Bishop, 61 App. Div., 18; and see Amsbey v. Hinds, 48 N. Y., 57.

A highway will not be abandoned for non-user if worked at all, even though it be worked but little and poorly. Marble v. Whitney, 28 N. Y., 297; McCarthy v. Whalen, 19 Hun, 503.

Highways which have been duly laid out cease to be highways if not opened and worked within six years, and if opened and worked in part, cease to be highways, except as to the part opened and worked, and

highways which have for six years been impassable for teams cease to be highways. Horey v. Village of Haverstraw, 124 N. Y., 273; City of Buffalo v. D., L. & W. R. R. Co., 68 App. Div., 488; City of Buffalo v. Hoffeld, 6 Misc., 197; Mangam v. Village of Sing Sing, 26 App. Div., 464; affd., 164 N. Y., 560; People ex rel. City of Yonkers v. N. Y. C. & H. R. R. R. Co., 69 Hun, 166; Woodruff v. Paddock, 56 Hun, 288; affd., 130 N. Y., 618. *Contra*, as to being passable for teams. Wakeman v. Wilbur, 147 N. Y., 657, 662.

And this is true, even though the obstruction which caused the original abandonment was made by a trespasser, if the obstruction was total. City of Buffalo v. D., L. & W. R. R. Co. and Horey v. Village of Haverstraw, *supra*.

But an owner of land abutting upon a street cannot acquire title to any portion of the highway by adverse possession not based upon a written instrument, unless he encloses the land or customarily cultivates it, and such cultivation must be notorious, hostile and exclusive. Halleran v. Bell Telephone Co., 64 App. Div., 41.

But compulsory abandonment of a highway, when no new highway is acquired, is not conclusive evidence of an intention to abandon. Freeholders v. Towns Glen and Florida, 20 N. Y. S. R., 394.

It is not necessary to file the description of the abandoned highway prescribed by the statute in order to have the abandonment become effective. Raynor v. Syracuse University, 35 Misc., 83, 93.

It *seems* that there may be an abandonment of a lateral portion of a highway by the shifting of the highway to one side of its original location. Mangam v. Village of Sing Sing, 26 App. Div., 464; affd., on opinion below, 164 N. Y., 560.

The doctrine of abandonment of highways by non-user applies to the streets of a village incorporated under the general act. Mangam v. Village of Sing Sing, *supra;* Horey v. Village of Haverstraw, *supra*.

And it also applies to the streets of a city where an easement only was taken. Matter of Fox St., 54 App. Div., 479; City of Buffalo v. D., L. & W. R. R. Co., 68 App. Div., 488; City of Buffalo v. Hoffeld, 6 Misc., 197; Raynor v. Syracuse University, 35 Misc., 83, 92.

But see, *contra*, where a fee was taken, Vanderbeck v. City of Rochester, 46 Hun, 87; Woodruff v. Paddock, 56 Hun, 288; 130 N. Y., 618.

This section applies to highways by dedication. People ex rel. Yonkers v. N. Y. C. & H. R. R. R. Co., 69 Hun, 166.

In cases of abandonment of highways the land between an abutter's line and the center of the highway reverts to the abutter, where an easement only was taken. Mangam v. Village of Sing Sing, 11 App. Div., 212.

A mere failure to *work* a road for six years will not always work an abandonment; and a highway once laid out is presumed to continue to exist until the contrary appears. Beckwith v. Whalen, 65 N. Y., 322; Woodruff v. Paddock, *supra*.

And will continue to exist until discontinued according to law. Driggs v. Phillips, 103 N. Y., 77; City of Cohoes v. D. & H. C. Co., 134 N. Y., 397.

As to the suspension of the running of the six years period by a delayed acceptance of a dedicated road, see Bridges v. Wyckoff et al., 67 N. Y., 130, holding that such delay suspends the running of the statute.

A six-year non-user is overcome by a subsequent long-continued user. Amshey v. Hinds, 46 Barb., 626; affd., 48 N. Y., 57.

The burden of proving non-user of a once dedicated street is upon the one alleging it. McVee v. City of Watertown, 92 Hun, 306; Horey v. Village of Haverstraw, 124 N. Y., 273.

A formal discontinuance of a private way which has been worked as a highway is a nullity. Miller v. Garlock, 8 Barb., 153.

Where the commissioners attempt to lay out as an old road a highway that has been abandoned for over twenty years, the owner of the fee of the road can maintain an action to cancel the order and survey. A mere grass-grown *cul de sac* of twenty years' standing, partially barred with posts and having no appearance of a highway, may be deemed abandoned. Riley v. Brodie, 22 Misc., 374.

Non-user of a highway for forty years will work an abandonment of it, despite the fact that a public pump and reservoir enclosed by a chain occupies a part of the unused portion. Mangam v. Village of Sing Sing, 11 App. Div., 212; s. c., 26 App. Div., 464; affd., 164 N. Y., 560.

And where a highway is abandoned, the land reverts to its former condition, and the grantee of the abutting lands succeeds to the original owner's title and right to possession. Haberman v. Baker, 128 N. Y., 253.

But where the abutting grantee took title to the edge of the highway only, or where the fee of the street is in the municipality, there would be no reversion to him. Haberman v. Baker, *supra.*

The interest of the public in lands used as a highway cannot be taken from the public and donated to the former owners of the fee. The People v. Commissioners of Highways of the Town of Palatine, 53 Barb., 70.

§ 100. **Highways by use.**— All lands which shall have been used by the public as a highway for the period of twenty years or more, shall be a highway, with the same force and effect as if it had been duly laid out and recorded as a highway, and the commissioners of highways shall order the overseers of highways to open all such highways to the width of at least two rods.

Revised from 1 R. S., ch. 16, tit. 1, art. 4, §§ 100, 101.

As to duty of commissioners to describe and record highways by use, see § 4, subd. 2, *ante.* Order to open highway, No. 96, *post.*

This section does not change the law as to what are highways by use. People ex. rel. Cunningham v. Osborn, 84 Hun, 441.

Before lands can become a highway by prescription they must have been used by the general public, as a highway, under a claim of right, without interruption or a substantial change, and they must have been kept in repair, taken in charge of and adopted by the public authorities, so that the town has become responsible for their condition and for injuries to travelers resulting from the negligence of the highway officers, and so that persons obstructing the same may be subject to a fine under the statute. Riley v. Brodie, 22 Misc., 374, 378 (citing many cases).

The use must be by the public as a highway for twenty years and with the knowledge, but without the consent, of the owner. City of Cohoes v. D. & H. C. Co., 134 N. Y., 397; People ex rel. Cunningham v. Osborn, 84 Hun, 441; but see Spier et al. v. Town of New Utrecht, 121 N. Y., 420, 430, holding that permissive user may establish a highway if continued for twenty years.

And must be under claim of right, and without interruption or substantial change, and the authorities must have taken charge of the highway and kept it in repair. Riley v. Brodie, *supra;* Spier et al v. Town of New Utrecht, 121 N. Y., 420; City of Buffalo v. D., L. & W. R. R. Co., 68 App. Div., 488; People v. Underhill et al., 144 N. Y., 316.

A highway by prescription may be acquired even though the owner be under a disability, as a lunatic, infant, etc., while the prescriptive rights are accruing. Devenbeck v. Lambert, 44 Barb., 596.

But miscellaneous trespasses by the public will not give rise to a highway by use. Matter of Hand St., 52 Hun, 206; 55 Hun, 132; and see opinion of Landon, J., in People v. Livingston, 27 Hun, 105.

Nor will permissive travel give rise to a highway by prescription. Hamilton v. Village of Owego, 42 App. Div., 312.

A private way does not become a public highway from the fact that it is worked as such. Miller v. Garlock, 8 Barb., 153; see Matter of Freeholders of Montezuma, 38 N. Y. S. R., 970; s. c., 14 N. Y. Supp., 845.

A private roadway, never laid out, repaired or recorded by the authorities, does not become a highway by public travel, and section 100 of the Highway Law does not change this rule. Harriman v. Howe, 78 Hun, 280; affd., 155 N. Y., 683; and see Palmer v. Palmer, 150 N. Y., 139; Spier et al. v. Town of New Utrecht, 121 N. Y., 420.

A town is liable for injuries caused by defects in a highway by use, that being one of the tests as to the existence of such a highway. Ivory v. Town of Deerpark, 116 N. Y., 476; Riley v. Brodie, 22 Misc., 374, *supra.*

Mere threats of interrupting the user by the public are of no avail to stop the acquiring of prescriptive rights; in order to be effective there must be an actual interruption. Devenbeck v. Lambert, 44 Barb., 576.

A failure to record a highway, which has had the necessary user, does not prevent its becoming a public highway. Lewis v. N. Y., L. E. & W. R. R. Co., 123 N. Y., 496; Galatin v. Gardner, 7 Johns., 106.

Where a street is plotted on a map made by the owner of lands, its acceptance by the authorities may be shown by long-continued user. Matter of Hunter, 28 Misc., 314; affd., 163 N. Y., 542; s. c., 164 N. Y., 365.

It is the duty of the commissioners to cause old roads to be opened to a width of at least two rods, and the order to so open them may be made without any preliminary proceedings whatever. Snyder v. Plass, 28 N. Y., 465; Alpaugh v. Bennett, 59 Hun, 45; Snyder v. Trumpbour, 38 N. Y., 355.

§ 101. **Fences to be removed.**— Whenever a highway shall have been laid out through any inclosed, cultivated or improved lands, in conformity to the provisions of this chapter, the commissioners of highways shall give to the owner or occupant of the land through which such highway shall have been laid, sixty days notice in writing to remove his fences; if such owner shall not remove his fences within the sixty days, the commissioners shall cause them to be removed, and shall direct the highway to be opened and worked.

Revised from 1 R. S., ch. 16, tit. 1, art. 4, §§ 96, 97, and id., art. 5, § 109.

For provisions as to obstructions and encroachments, see §§ 104, 105, *post.*

For form of notice to remove fences, see No. 97, *post.*

Failure to give notice to remove fences is fatal to an action for obstructing a highway with them, and the giving of the notice must be proven and will not be presumed; but the objection of want of notice may not be raised for the first time upon appeal. Cooper v. Bean, 5 Lans., 318; Case v. Thompson, 6 Wend., 634; Drake v. Rogers, 3 Hill, 604.

§ 102. **Penalty for falling trees.**— If any person shall cut down any tree on land not occupied by him, so that it shall fall into any highway, river or stream, unless by the order and consent of the occupant, the person so offending shall forfeit to such occupant, the sum of one dollar for every tree so fallen, and the like sum for every day the same shall remain in the highway, river or stream.

Revised from 1 R. S., ch. 16, tit. 1, art. 5, §§ 111, 112.

For penal provision for injury to trees, see Penal Code, § 639, subd. 5; § 640, subds. 1, 2, 3.

For provisions as to ownership of trees in highways, see § 156, *post.*

§ 103. **Fallen trees to be removed.**—If any tree shall fall, or be fallen by any person from any inclosed land into any highway, any person may give notice to the occupant of the land from which the tree shall have fallen, to remove the same within two days; if such tree shall not be removed within that time, but shall continue in the highway, the occupant of the land shall forfeit the sum of fifty cents for every day thereafter until the tree shall be removed.

Revised from 1 R. S., ch. 16, tit. 1, art. 5, § 110.

For provisions as to ownership of trees in highways, see § 156, *post.*

For provisions as to obstructions and encroachments in highways, see §§ 104, 105, *post.*

All penalties to be recovered by the commissioners of highways in the name of the town, § 164, *post.*

For form of notice to remove fallen trees, see No. 98, *post.*

§ 104. **Penalty for obstruction or encroachment.**— Whoever shall obstruct or encroach upon any highway, or shall unlawfully fill up or place any obstruction in any ditch for draining the water from any highway, shall forfeit for every such offense the sum of five dollars.

Revised from 1 R. S., ch. 16, tit. 1, art. 5, §§ 102, 112.

For injuries to highways generally, see § 15, *ante.*

For duty of overseer to open obstructed highways, see § 21, *ante.*

For duty of commissioners to open obstructed highways, see § 105, *post.*

For recovery of penalties generally, see § 164, *post.*

Penal provisions for interference with or obstruction of a highway and for placing injurious substances on roads, etc., Penal Code, §§ 385-387, 654a.

For rights of electric light and power companies to erect poles in highways, see Trans. Corp. Law (L. 1890, ch. 566) § 61, and cases below.

For rights of telephone and telegraph companies to erect poles in highways, see Trans. Corp. Law (L. 1890, ch. 566) § 102, and cases under this section, *post.*

As to rights of railroad companies to cross highways with their tracks, and their duty to restore the highway to its original condition, see Railroad Law (L. 1890, ch. 565) § 11, and L. 1835, ch. 300, page 188, *post.*

A certain amount of obstruction of a highway will be allowed, but no obstruction will be allowed which is not reasonably necessary for

the transaction of business, nor will any obstruction be allowed which unreasonably interferes with the rights of the public. Tinker v. N. Y., Ontario & Western R. Co., 157 N. Y., 312; Flynn v. Taylor, 127 N. Y., 596.

Temporary obstruction of village sidewalks by teams has been held allowable. Fisher v. Village of Cambridge, 57 Hun, 296; Hand v. Klinker, 7 N. Y. S. R., 21; 54 Super. Ct., 433.

And the temporary obstruction of sidewalks by the use of skids to aid in removing merchandise from a wagon to a building has been held allowable. Welsh v. Wilson, 101 N. Y., 252.

But where these obstructions were so frequent and long continued as to constitute an unreasonable interruption of the public use they were held not allowable. Callanan et al. v. Gilman, 107 N. Y., 360; Flynn v. Taylor, 53 Hun, 167; affd., 127 N. Y., 596.

An abutter who causes an unreasonable obstruction of a highway must keep his premises at the point where one seeking to pass around the obstruction would come upon them in a reasonably safe condition for such passage. Linehan v. Western El. Co., 29 App. Div., 462.

A ditch may be an obstruction in a highway, and *obstructions* are nuisances. Harlow v. Humiston, 6 Cow., 189; Lansing v. Smith, 8 Cow., 146; Dygert v. Schenck, 23 Wend., 446. See, also, The People v. Lambier, 5 Den., 9; Rogers v. Rogers, 14 Wend., 131; Davis v. The Mayor, etc., of New York, 14 N. Y., 506; 8 Super. Ct., 459; The People v. Sturtevant, 9 N. Y., 263; Peckham v. Henderson, 27 Barb., 207.

But an *encroachment* upon a highway is not a nuisance, unless it annoys the public. Griffith v. McCullum, 46 Barb., 561; Howard v. Robbins, 1 Lans., 63. But see Village of Hempstead v. Ball El. Light Co., 9 App. Div., 48.

As to the distinction between obstructions and encroachments, see Devenbeck v. Lambert, 44 Barb., 596.

One who places an obstruction in a ditch which carries water from a highway onto his land, is within the statute and liable to the penalty where the ditch was so constructed to protect the highway and does him no material damage. Bailey v. Frost, 4 Week. Dig., 269.

But where the ditch is so constructed as to materially increase or change the natural flow of surface waters to the detriment of the abutter, he may turn back the increased flow. Thompson v. Allen, 7 Lans., 459.

There may an encroachment upon a highway which is such by use only. Fowler v. Mott, 19 Barb., 204; Town of West Union v. Richey, 64 App. Div., 156.

But where a highway is such by use only a building is not an encroachment, unless it is on the land which had been actually used as a highway. Flood v. Van Wormer, 70 Hun, 415; 147 N. Y., 284.

Since mere dedication without acceptance does not make a highway, there can be no obstruction of a highway which has been merely dedicated and not accepted and laid out, nor used for twenty years.

And a single act of repair may not amount to an acceptance. The Trustees of Jordan v. Otis, 37 Barb., 50.

But if accepted, it becomes a highway, whether ever laid out or not, and the person obstructing it is liable for the penalty. Town of Corning v. Head, 86 Hun, 12.

The statute as to obstructions and encroachments has been held to apply to piers in New York city. People v. Macy, 62 How. Pr., 65.

After a great lapse of time, and in the absence of positive proof, the presumption is that a building is not an encroachment. Mogg v. West, 8 Week. Dig., 105.

The Legislature has power to authorize what would otherwise be obstructions and encroachments, and it may delegate that power to a municipality. Hoey v. Gilroy et al., 129 N. Y., 132; Barhite v. Home Telephone Co., 50 App. Div., 25; City of Rochester v. Bell Telephone Co., 52 App. Div., 6.

But this license to obstruct or encroach upon highways may be revoked or modified when the public interest requires it. A. R. T. Co. v. Hess et al., 125 N. Y., 641.

The authorization of a news stand upon a street is within this power. People ex rel. Simon v. Mayor, 20 Misc., 189.

But a hack stand may not occupy a public street. McCaffrey v. Smith, 41 Hun, 117; People ex rel. Thompson v. Brookfield, 6 App. Div., 398; s. c., *post.*

The erection of poles and the stringing of wires along a highway for the purpose of lighting it where necessary, pursuant to a contract with the local authorities, is a public use and imposes no additional burden upon the fee. Palmer v. Larchmont Electric Co., 158 N. Y., 231.

And the fact that the same poles carry wires used for private lighting does not authorize their removal, though it may warrant enjoining the use for private purposes. Johnson v. Thompson-Houston Electric Co., 54 Hun, 469.

But trees may not be trimmed to clear the wires, if there exists any feasible way of avoiding so doing. Van Sicklen v. Jamaica Electric Light Co., 45 App. Div., 1.

A company's rights under a general permission to erect poles for electric lighting have been protected by injunction. Electric Construction Co. v. Heffernan et al., 34 N. Y. S. R., 436; 12 N. Y. Supp., 336; Consumers' Gas Co. v. Congress Spring Co., 61 Hun, 133.

But where such a company abandons its contract with the village for lighting the village, the village may compel the removal of the poles. Village of Hempstead v. Ball Electric Co., 9 App. Div., 48.

A city may be liable to an abutter for the obstruction of a highway. St. John v. Mayor, etc., New York, 6 Duer, 315; 3 Bosw., 483.

Where the poles incommode the public, and are unnecessary for the company's business, they are a nuisance, and their continuance may be

restrained. People v. Metropolitan Telephone, etc., Co., 11 Abb. N. C., 304; 64 How. Pr., 66; and see A. R. T. Co. v. Hess et al., 125 N. Y., 641.

Under § 102 of the Transportation Corporation Law, telephone and telegraph companies have a right to set their poles and string their wires along public highways without first obtaining the consent of local authorities, but subject to their reasonable police regulations. Barhite v. Home Telephone Co., 50 App. Div., 25; City of Rochester v. Bell Telephone Co., 52 App. Div., 6.

Where a highway is discontinued an existing obstruction ceases to be a nuisance. Drake v. Rogers, 3 Hill, 604; and see Briggs v. Bowen, 60 N. Y., 454.

The fact that an abutter has not been paid damages sustained by him in laying out a highway will not excuse his obstruction of it. Chapman et al. v. Gates, 54 N. Y., 132.

But an unopened highway cannot be obstructed. Little v. Denn, 34 N. Y., 452.

It was formerly held that no obstruction made by an adjoining owner could deprive the commissioners of highways of jurisdiction over that part of the highway. Driggs v. Philips, 103 N. Y., 77; Woodruff v. Paddock, 56 Hun, 288, 130 N. Y., 618; Mangam v. Village of Sing Sing, 26 App. Div., 464; affd., 164 N. Y., 560. But see Horey v. Village of Haverstraw, 124 N. Y., 273, and City of Buffalo v. D., L. & W. R. R. Co., 68 App. Div., 488.

One may construct a driveway from the traveled portion of the highway to his own premises, and if he does it in such a manner as not to interfere with the public easement over the improved and customarily used portion of the highway, it is not a nuisance such as a private person may abate; only an actual obstruction may be so abated. Strickland v. Woolworth, 3 Thomp. & Cook, 286.

The fact that an encroachment was not so great as to actually render travel impossible would not alone render the commissioners liable for trespass in removing it. Van Wyck v. Lent, 33 Hun, 301; Hathaway v. Jenks, 67 Hun, 289.

One who has occasion to leave a load in the highway must remove it with promptness, and if he leaves it there an unreasonable length of time, it becomes a nuisance and a highway officer may remove it. Northrop v. Burrows, 10 Abb. Pr., 365.

One cannot legally carry on any part of his business in a public highway to the hindrance of the public; nor may he carry it on in such a manner as to cause large numbers of wagons to congregate in front of his premises to the hindrance of public travel. The People v. Cunningham, 1 Den., 524.

No notice to remove an obstruction is necessary to the maintenance of action to recover the penalty provided by this section. Town of Corning v. Head, 86 Hun, 12; and see Moore v. Village of Fairport, 11 Misc., 146.

The primary use of a highway is for transportation, and any obstruction or encroachment which interferes with such use is a nuisance. But temporary and reasonable use of a highway by hackmen or private carriages is not a nuisance. People ex rel. Thompson v. Brookfield, 6 App. Div., 398.

Works of art, as, for example, a soldiers' monument, are not an encroachment or obstruction upon a highway, if not a hindrance to its use; and their erection is not a trespass upon the rights of the owner of the fee. Tompkins v. Hodgson, 2 Hun, 146; 4 Thomp. & Cook, 435.

Where a highway is for any reason temporarily in such a foundrious or obstructed condition that it cannot be traveled without reasonable fear of harm, and there is no feasible way of going around by other roads, and the defective or obstructed condition of the highway cannot be remedied by a reasonable effort on the part of the traveler, he may go upon the abutting lands to pass around the defective or obstructed portion, but he must do as little damage as may be, and keep as near as practicable to the highway. Holmes v. Seely, 19 Wend., 507; Williams v. Safford, 7 Barb., 309; Newkirk v. Sabler, 9 Barb., 652; Elliot, Roads and Streets (2d ed.), §§ 12-15; 15 Am. & Eng. Enc. L. (2d ed.), 506.

It was held in White v. Wiley, 36 N. Y. S. R., 102; 13 N. Y. Supp., 205, that nothing short of absolute necessity would justify going upon an abutter's land, but this is evidently not in accord with the other authorities.

But this right of *extra viam* seems not to exist as to a private road or way. Matter of Burdick, 27 Misc., 298; Holmes v. Seely, and cases following, *supra*.

Even though the abutter rendered the way impassable. Williams v. Safford, *supra*.

But it is said that the right of *extra viam* does exist as to a private way *by necessity*. Holmes v. Seely, *supra;* but see, *contra*, Williams v. Safford, *supra*.

Shade trees planted in a highway before the enactment of the Highway Law, held not an encroachment or obstruction. Town of Wheatfield v. Shasley, 23 Misc., 100; Edsall v. Howell, 86 Hun, 424.

See many additional cases under § 105, *post*.

§ 105. **How removed and liability for not removing.**—The commissioners of highways shall serve upon the owner or occupant of lands adjoining that part of a highway within their town, in which any obstruction or encroachment may exist, a notice specifying the extent and location of such obstruction or encroachment, and directing such owner or occupant to remove the same within a specified time, not more than sixty days after the service of the notice. If such owner or occupant shall neglect or refuse

to remove such obstruction or encroachment within such time, he shall forfeit to the town the sum of twenty-five dollars; and the commissioners may remove such obstructions or encroachments at the expense of the town, which may be recovered by action, of such owner or occupant; or the said commissioners may bring an action in any court of competent jurisdiction, to compel such owner or occupant to remove such obstruction or encroachment. Actions by commissioners of highways, as in this section provided, shall be in the name of the town.

Revised from 1 R. S., ch. 16, tit. 1, art. 5, §§ 103-108; L. 1840, ch. 300; L. 1862, ch. 243, and L. 1878, ch. 245, §§ 1, 2.

Actions for injuries to highways, § 15, *ante*.

Liability of towns for defective highways, § 16, *ante*.

Recovery of penalties generally, § 164, *post*.

Form of order and notice required by this section, Nos. 99-101, *post*.

Obstructing highway punishable as a misdemeanor, Penal Code, §§ 385-387. Flynn v. Taylor, 127 N. Y., 596.

As to the scope of this section generally, see Town of Wheatfield v. Shasley, 23 Misc., 100.

This section modifies, in several essential particulars, the former statute. It simply requires that the owner or occupant have an opportunity, after specific notice, to remove the obstruction. Moore v. Village of Fairport, 11 Misc., 146.

An abutter may go into a highway to remove an obstruction which throws large quantities of water upon his land. Comr. of Highways v. Bates, 26 Week. Dig., 33.

So, also, may he remove any encroachment or obstruction which injures him specially. Griffith v. McCullum, 46 Barb., 561; and see Halleran v. Bell Telephone Co. and Dominick v. Hill, 6 N. Y. S. R., 329; 26 Week. Dig., 239 below.

Trespass lies by the owner of the fee of a highway against a person who exclusively appropriates the highway. Cortelyou v. Van Brundt, 2 Johns., 357; Jackson v. Hathaway, 15 Johns., 447; Matter of Seventeenth St., 1 Wend., 262; Gidney v. Earl, 12 Wend., 98; and see Halleran v. Bell Telephone Co., 64 App. Div., 41.

And where the trespasses are continuous the owner may invoke the aid of equity to restrain them. Coatsworth v. Lehigh Valley R. Co., 156 N. Y., 451.

Where the obstruction injures all alike and none specially a private person may not compel its removal, but where one is specially injured he may compel its removal. Halleran v. Bell Telephone Co., 64 App. Div., 41.

An abutter cannot grant the exclusive use of the highway opposite his premises to any person, as, for example, to the proprietor of a hack stand. Deiz v. Lamb, 29 Supr. Ct. (6 Robt.), 537.

In addition to the liability to the municipality of one who obstructs or encroaches upon a highway, there is another liability which is incurred, and that is the liability to any one who is damaged by such obstruction or encroachment. This liability is scarcely within the scope of a work of this kind, but a reference to the following cases will readily settle its nature and limitations: Wakeman v. Wilbur, 147 N. Y., 657; Houghtaling v. Shelley, 51 Hun, 598; Callanan et al. v. Gilman, 107 N. Y., 360; Anderson v. Young, 66 Hun, 240; Congreve v. Smith, 18 N. Y., 79; Mairs v. Manhattan Real Estate Association, 47 Super. Ct., 31; affd., 89 N. Y., 498; De Witt v. Van Schoyk, 35 Hun, 103; affd., 110 N. Y., 7; Wright v. Saunders, 65 Barb., 214; affd., 3 Keyes, 323; Clifford v. Dam, 81 N. Y., 52 (this case is distinguisned in Williams v. Hynes, 55 Super. Ct., 86; 18 N. Y. S. R., 316); Flynn v. Taylor, 53 Hun, 167; affd., 127 N. Y., 596.

A private individual may bring an action for the obstruction of, injury to, or encroachment upon a highway, which causes him special injury. Electric Construction Co. v. Heffernan et al., 34 N. Y. S. R., 436; 12 N. Y. Supp., 336; Van Brundt v. Ahearn, 13 Hun, 388; Hood v. Smith et al., 5 Week. Dig., 117; Ninth Ave. R. R. Co. v. N. Y. Elevated R. Co., 3 Abb. N. C., 347; 7 Daly, 174; Milburn v. Fowler, 27 Hun, 568, and see Houghtaling v. Shelley and cases following in notes to this section, *ante*.

As to obstructions and encroachments upon tow-paths of canals, see Conklin v. Phoenix Mills of Seneca Falls, 62 Barb., 299.

It is held that permission from the authorities to obstruct a highway will not prevent an action by an individual for his damages. Mairs et al. v. Manhattan Real Estate Association, 89 N. Y., 498; Masterson v. Short, 30 Super. Ct. (7 Robt.), 299; 35 How. Pr., 169.

The commissioners of highways may and ought to remove a building which is placed upon a highway and obstructs public travel. Cook v. Harris et al., 61 N. Y., 448.

It seems that great particularity in giving the notice required by this section is not necessary. An informal notice will protect the commissioners from liability for trespass. Hathaway v. Jenks, 67 Hun, 289; Kline v. Hibbard, 80 Hun, 50; affd., 155 N. Y., 679.

But the notice should state particularly the width of the road originally intended and the location and extent of the obstruction. Spicer v. Seade, 9 Johns., 359; Cook v. Covil, 18 Hun, 288; Mott v. Comrs., etc., of Rush, 2 Hill, 472.

And it must be sufficiently definite to enable the party upon whom it is served to go upon the ground to fix the place and extent of the encroachment with certainty and without embarrassment; and describing the encroachment by reference to a map in the possession of the commissioners of highways is not sufficient, even though inspection

of the map is offered. Town of Sardinia v. Butler, 149 N. Y., 505; but see Town of Palatine v. N. Y. C. & H. R. R. R. Co., 22 App. Div., 181; also James v. Sammis et al., 132 N. Y., 239, holding that notice and description of encroachment may be in separate instruments if annexed to each other.

The trustees of a village and the commissioners of highways by the charter have the same power to compel the removal of obstructions and encroachments as the commissioners of highways in towns. Village of Hempstead v. Ball Electric Co., 9 App. Div., 48.

Obstructions in a ditch causing a wet place in a highway may be summarily removed. Dominick v. Hill, 6 N. Y. S. R., 329, 26 Week. Dig., 239.

Commissioners of highways may remove obstructions from highways which are such by use only. Town of West Union v. Richey, 64 App. Div., 156; People ex rel. Butler v. Hunting, 39 Hun, 452; James v. Sammis et al., 132 N. Y., 239; Town of Corning v. Head, 86 Hun, 12; Bayles v. Roe, 1 Silv. Supr. Ct., 356; 5 N. Y. Supp., 279, and see Marvin v. Pardee, 64 Barb., 353.

And the penalty may be recovered in such cases as though the highway were regularly laid out. Town of West Union v. Richey, 64 App. Div., 156.

As to what are encroachments in highways by use, see Flood v. Van Wormer, 70 Hun, 415, affd. 147 N. Y., 284, holding that a building is not an encroachment upon a highway by use, unless it is upon the land actually used for highway purposes. And see Kerr v. Hammer, 39 N. Y. S. R., 708; 15 N. Y. Supp., 605.

But mandamus will not lie to compel the removal of hackmen and private carriages which temporarily and in a reasonable manner occupy a highway. People ex rel. Thompson v. Brookfield, 6 App. Div., 398.

The construction of a plank-road upon a highway does not prevent the commissioners from removing obstructions and encroachments. Walker v. Caywood et al., 31 N. Y., 51.

The complaint in an action for the removal of obstructions from a certain "street and avenue" was properly dismissed for failure to show that the street and avenue were highways, or that the plaintiff had any private interest therein. Jones v. Doherty, 17 App. Div., 628.

The penalty provided by this section is not incurred until there is a failure to remove after valid notice. Fleet v. Youngs, 7 Wend., 291; Town of Sardinia v. Butler, 149 N. Y., 505; see Town of Corning v. Head, 86 Hun, 12.

An objection that the assessment for the expense of the highway was not properly made is not admissible in defense of an action for the obstruction of a highway. Cooper v. Bean, 5 Lans., 318.

And the preliminary steps taken in opening a highway need not be shown by the plaintiff. The record of the highway is sufficient. Sage v. Barnes, 9 Johns., 365; but see Marvin v. Pardee, 64 Barb., 353, below.

And jurisdiction will be presumed where an order laying out the highway is admitted without objection. Cooper v. Bean, 5 Lans., 318.

And even the record need not be produced where it is shown that the road has been used and worked and regarded as a public highway for fifteen years before the obstruction in question. Chapman v. Gates, 46 Barb., 313; affd. 54 N. Y., 132.

But an abutter may, in his action for damages for the removal of his fences along the highway, show that an alleged order, laying out a highway in such a way that his fences were encroachments, was made without authority. Marvin v. Pardee, 64 Barb., 353. This decision is said by Elliott (Roads and Streets, 2d ed., page 404n) to be erroneous and to violate the rule that one who is *not* an abutter cannot defend a prosecution for the obstruction of a highway by attacking the regularity of the proceedings to lay out the highway where jurisdiction is shown and an order in due form is produced. But it would seem that this case is not such a one as he mentions, because this action was brought by an *abutter* and it would seem that the authorities were assuming to act *beyond their jurisdiction.* For a case along the line of the doctrine which the learned author lays down, see Cooper v. Bean, 5 Lans., 318, *supra.*

It would seem that two towns may not join in an action to recover a penalty or forfeiture for an encroachment upon a highway built upon the line of the towns. Bradley v. Blair, 17 Barb., 480. And compare Palmer v. Plank-Road Co., 11 N. Y., 376.

Where a complaint alleges that the highway in question is one by use, a recovery may still be had where the proof shows that the highway is one of record. Town of Sardinia v. Butler, 78 Hun, 527; reversed on another point, 149 N. Y., 505.

A general plea of title to the premises, coupled with a denial of the existence of the highway, is sufficient to allow the defendant to question the existence of the highway or the fact of an obstruction. Little v. Denn, 34 N. Y., 452. This case contains an elaborate discussion of the procedure in this kind of actions.

And it has also been held that a general denial alone is sufficient to allow the defendant to controvert either user as a highway or the fact of the obstruction. Saunders v. Townsend, 26 Hun, 308.

And it has been held that where the defendant does not plead title to the premises, the controversy is limited to the questions of obstruction or encroachment and user as a highway. Town of West Union v. Richey, 64 App. Div., 156.

An injunction will lie to restrain the summary removal of a building alleged to be an encroachment upon a highway where its removal will cause irreparable injury. Flood v. Van Wormer, 70 Hun, 415; affd. 147 N. Y., 284.

But the contrary was held in a case where the commissioners had made an order adjudging a fence to be an encroachment. Hyatt v. Bates, 40 N. Y., 164.

An action will not lie in equity to prevent or remove an obstruction of a highway. Rozell et al. v. Andrews, 103 N. Y., 150; but see, *contra*, City of Niagara Falls v. N. Y. C. & H. R. R. R. Co., 168 N. Y., 610.

A railroad company may be compelled to surrender its possession of an abandoned turnpike. Town of Palatine v. N. Y. C. & H. R. R. R. Co., 22 App. Div., 181.

It is optional with the commissioner whether to bring an action or proceed summarily. Flood v. Van Wormer, 147 N. Y., 284, and see Town of Wheatfield v. Shasley, 23 Misc., 100.

And this is so, even though the highway became such originally by the plotting of a tract of land owned by an association, which association had passed a resolution authorizing such an obstruction, but which resolution was never publicly recorded. Rudolph v. Ackerman, 58 App. Div., 596.

But an abutter who does not own the fee of a highway cannot compel the removal of telegraph poles from the roadside when they do not cause any substantial damage to any easement of light, air or access, which he may have in the highway. Halleran v. Bell Telephone Co., 64 App. Div., 41; see Eels v. A. T. & T. Co., 143 N. Y., 133, and see notes to § , *ante*.

Commissioners may compromise claims for penalties recoverable for the obstructions of highways and may take securities for their payment at a future date. Commissioners of Highways of Cortlandville v. Peck, 5 Hill, 215.

As to encroachments and obstructions by elevated railroads, see Levin v. N. Y. El. R. R. Co., 165 N. Y., 572; Heimburg v. Manhattan Ry. Co., 162 N. Y., 352; Shaw v. Manhattan Avenue R. Co., 35 Misc., 47; Shepard v. Metropolitan Elevated R. Co., 48 App. Div., 452; Stokes v. Manhattan R. Co., 47 App. Div., 58, and note carefully the decision in Fries v. New York & Harlem R. R. Co., 169 N. Y., 270.

Proceedings under § 11 of the Railroad Law to compel a railroad to restore a highway at a crossing to its former state are entirely distinct from proceedings under this and the preceding sections. People ex rel. Bacon v. N. C. Ry. Co., 164 N. Y., 289.

The commissioners first make a determination of the extent of the encroachment and then serve the notice. Flood v. Van Wormer, 70 Hun, 415; 147 N. Y., 284.

See many additional cases under § 104, *ante*.

§ 106. **Private road.**— An application for a private road shall be made in writing to the commissioners of highways of the town in which it is to be located, specifying its width and location.

courses and distances, and the names of the owners and occupants of the land through which it is proposed to be laid out.

(R. S., pp. 1379, 1383; *post*, pp. 882-893.)*

Revised from 1 R. S., ch. 16, tit. 1, art. 4, § 77, and L. 1853, ch. 174, § 1.

Private roads may be annexed to highway district. § 37, *ante*.

For constitutional provisions, see Constitution, art. 1, § 7, in notes to § 107, *post*.

For form of application under this section, see No. 102, *post*.

In a case where proceedings were had under §§ 106-116 of the Highway Law for laying out a private road to a quarry, the court held that the proceedings were entirely without force and effect, because the method provided by these sections for assessing damages is unconstitutional. Berridge v. Schults, 32 Misc., 444; see additional note on this case under § 107, *post*.

Consent of owner to laying out of private road may be oral. Baker v. Braman, 6 Hill, 47; Mohawk and Hudson R. R. Co. v. Artcher, 6 Paige, 83. A private road cannot be laid out across the inclined plane of a railroad. Mohawk and Hudson R. R. Co. v. Artcher, *supra*.

Technical accuracy of description is not required and the description of a proposed private road by reference to a private way which has been used a great many years and has been called a road may be sufficiently definite. Satterly v. Winne, 101 N. Y., 218.

As to contents of application, see People v. Taylor, 34 Barb., 481, and form of application, page , *post*.

An obstruction placed in a private road by the owner of the fee cannot be removed by one who has no right to the use of the road. Drake v. Rogers, 3 Hill, 604.

As to whether application should be for a public road or a private road, see Matter of Burdick, 27 Misc., 298.

§ 107. **Jury to determine necessity and assess damages.**—One or more of the commissioners to whom the application shall be made, shall appoint as early a day as the convenience of the parties interested will allow, when, at a place designated in the town, a jury will be selected for the purpose of determining upon the necessity of such road, and to assess the damages by reason of the opening thereof.

Revised from L. 1853, ch. 174, § 2.

For method of selecting jury, see §§ 110,111, *post*, and method of assessing damages, §§ 113-115, *post*.

* So in the original.

The Constitution of the State provides in the second paragraph of art. 1, § 7, that, "Private roads may be opened in the manner to be prescribed by law; but in every case the necessity of the road and the amount of all damage to be sustained by the opening thereof shall be first determined by a jury of freeholders, and such amount, together with the expenses of the proceeding, shall be paid by the person to be benefited." And it has been held that the jury provided by the Highway Law is not such a jury as this constitutional provision contemplated, and that proceedings under § 106 *et seq.* of the Highway Law to open a private road to a quarry confer no rights upon the owner of the quarry and that the adjoining owner might restrain the construction of the private road. Berridge v. Schults, 32 Misc., 444, citing People ex rel. Eckerson v. Trustees, 151 N. Y., 75, and Matter of Tuthill, 163 N. Y., 133. The Eckerson case was one in which the Court of Appeals considered the requirement of another portion of art. 1, § 7, of the Constitution than that above cited, that when private property is taken for a public use the compensation "shall be ascertained by a jury," and held that the "jury" intended was "a jury of men with such qualifications as the law in force at the time prescribes for jurors serving in the courts and selected from one of the lists in use by the courts." It will be seen that the Constitution in the Berridge case required "a jury of freeholders," while in the Eckerson case it required "a jury" from which might be drawn a distinction which seems not to have been attempted. However, the doctrine which has heretofore prevailed to some extent of thus allowing private property to be taken for private use is so anomolous that the constitutionality of this procedure and of the entire doctrine may be seriously questioned, see Taylor v. Porter, 4 Hill, 140.

§ 108. **Copy application and notice delivered to applicant.**— Such commissioners shall deliver to the applicant a copy of the application to which shall be added a notice of the time and place appointed for the selection of the jury, addressed to the owners and occupants of the land.

Revised from L. 1853, ch. 174, § 3.

For form of notice under this section, see No. 103, *post.*

§ 109. **Copy and notice to be served.**— The applicant on receiving the copy and notice shall, on the same day, or the next day thereafter, excluding Sundays and holidays, cause such copy and notice to be served upon the persons to whom it is addressed, by delivering to each of them who reside in the same town a copy thereof, or in case of his absence, by leaving the same at his resi-

dence, and upon such as reside elsewhere, by depositing in the post-office a copy thereof to each, properly inclosed in an envelope, addressed to them respectively at their post-office address, and paying the postage thereon, or, in case of infant owners, by like service upon their parent or guardian.

Revised from L. 1853, ch. 174, § 4.

Proof of service, form No. 104, *post.*

It *seems* that a vendee under a land contract is an "owner." Benedict v. Calkins, 45 Hun, 549; but see, *contra*, Smith v. Ferris, 6 Hun, 553.

As to waiver of written notice by appearance upon the hearing after oral notice, see Mohawk and Hudson Railroad Co. v. Artcher, 6 Paige, 83.

§ 110. **List of jurors.**— At such time and place, on due proof of the service of the notice, one or more of the commissioners shall present a list of the names of eighteen resident freeholders of the town, in no wise of kin to the applicant, owner or occupant, or either of them, and not interested in such lands.

Revised from L. 1853, ch. 174, § 5; L. 1859, ch. 373, and L. 1860, ch. 468.

That this method of selecting a jury is unconstitutional, see Berridge v. Schults in notes to § 107, *ante.*

If no objection was made to the jurors it will be presumed that they were freeholders or that the requirement was waived. The People v. Taylor, 34 Barb., 481.

§ 111. **Names struck off.**— The owners or occupants of the land, may strike from the list not more than six names, and the applicant a like number; and of the number which remain, the six names standing first upon the list shall be the jury.

Revised from L. 1853, ch. 174, § 6.

That this method of selecting a jury is unconstitutional, see Berridge v. Schults in notes to § 107, *ante.*

§ 112. **Place of meeting.**— The commissioner or commissioners present, shall then appoint some convenient time and place for the jury to meet, and shall summon them accordingly.

Revised from L. 1853, ch. 174, § 7.

Summons to juror, No. 105, *post.*

The commissioners cannot delegate the summoning of the jury, but an objection to their doing so is waived by appearance at the meeting and failure to object. The People v. Commissioners, etc., of Greenbush, 24 Wend., 367.

§ 113. **Jury to determine and assess damages.**— At least one commissioner and all the persons named and summoned on such jury, shall meet at the time and place appointed; but if one or more of the six jurors shall not appear, the commissioner or commissioners present shall summon so many qualified to serve as such jurors as will be sufficient to make the number present six, to forthwith appear and act as such; and when six shall have so appeared, they shall constitute the jury, and shall be sworn well and truly to determine as to the necessity of the road, and to assess the damages by reason of the opening thereof.

Revised from L. 1853, ch. 174, §§ 8, 9.

Allowance for additional fencing required, § 122, *post*. Oath to jury and witness, Nos. 106, 107, *post*.

As to adjournment of meeting, see § 123, *post*.

The assessment of damages before the highway is opened or worked or used may be waived; what amounts to such a waiver. Chapman v. Gates, 46 Barb., 313.

§ 114. **Their verdict.**— The jury shall view the premises, hear the allegations of the parties, and such witnesses as they may produce, and if they shall determine that the proposed road is necessary, they shall assess the damages to the person or persons through whose land it is to pass, and deliver their verdict in writing to the commissioners.

Revised from 1 R. S., ch. 16, tit. 1, art. 4, § 78, and L. 1853, ch. 174, § 10.

Form of verdict, No. 108, *post*.

§ 115. **Value of highway discontinued.**— If the necessity of such private road has been occasioned by the alteration or discontinuance of a public highway running through the lands belonging to a person through whose lands the private road is proposed to be opened, the jury shall take into consideration the value of the highway so discontinued, and the benefit resulting to the person by reason of such discontinuance, and shall deduct the same from the damages assessed for the opening and laying out of such private road.

Revised from L. 1853, ch. 174, § 11.

For deduction for value of highways discontinued upon the opening of a public highway, see § 87, *ante*.

§ 116. **Papers to be recorded in the town clerk's office.**— The commissioners shall annex to such verdict the application, and

their certificate that the road is laid out, and the same shall be filed and recorded in the town clerk's office.

Revised from L. 1853, ch. 174, § 12.

For filing papers upon the opening of a public highway, see § 98, *ante*.

Filing papers generally, § 150; order laying out road, No. 109, *post*.

An order of commissioners laying out a private way may be sufficient as regards the description of the private way, where it describes it as laid out pursuant to the application, even though the application described the proposed road only by reference to an existing private way. Satterly v. Winne, 101 N. Y., 218.

See People v. Robinson, 29 Barb., 80.

§ 117. **Damages to be paid before opening the road.**— The damages assessed by the jury shall be paid by the party for whose benefit the road is laid out, before the road is opened or used; but if the jury shall certify that the necessity of such private road was occasioned by the alteration or discontinuance of a public highway, such damages shall be paid by the town, and refunded to the applicant.

Revised from L. 1853, ch. 174, § 14.

Damages for opening public highway and costs of proceedings, §§ 92, 93, *ante*.

That the damages must be paid before the road is opened and used, see Mohawk and Hudson Railroad Co. v. Artcher, 6 Paige, 83.

The right to an assessment of damages before a highway should be opened or worked or used, may be waived; what amounts to such a waiver. Chapman v. Gates, 46 Barb., 312.

The damages must be paid by the applicant unless the necessity for the road was occasioned by the discontinuance or alteration of a public highway in which case they must be repaid by the town to the applicant. Matter of Lawton, 22 Misc., 426.

§ 118. **Fees of officers.**— Every juror, in proceedings for a private road, shall be entitled to receive for his services one dollar and fifty cents; and commissioners, of highways, their per diem compensation, to be paid by the applicant.

Revised from L. 1880, ch. 114, § 4.

§ 119. **Motion to confirm, vacate or modify.**— Within thirty days after the decision of the jury shall have been filed in the town clerk's office, the owner or occupant may apply to the county

court of the county wherein such private road is situated, for an order confirming, vacating or modifying their decision; and such court may confirm, vacate or modify such decision as it shall deem just and legal. If the decision is vacated, the court may order another hearing of the matter before another jury, and remit the proceedings to the commissioners of highways of the same town for that purpose. If no such motion is made, the decision of the jury shall be deemed final. The motion shall be brought on, upon the service of papers on the adverse party in the proceeding, according to the usual practice of the court in actions and special proceedings pending therein, and the decision of the county court shall be final, except that a new hearing may be had, as herein provided. If the final decision shall be adverse to the applicant, no other application for the same road shall be made within two years.

Revised from L. 1853, ch. 174, § 5; L. 1859, ch. 373, and L. 1860, ch. 468.

For notes upon the law and practice in analogous proceedings, see notes to § 89, *ante*.

As to costs of this motion, see § 152, *post*.

For form of notice of application under this section, see No. 108, *post*.

For form of order under this section, see No. 108, *post*.

§ 120. **Costs of new hearing.**— If upon a new hearing, the damages assessed are increased, the applicant shall pay the costs and expenses thereof, otherwise the owner shall pay the same.

New.

§ 121. **For what purpose private road to be used.**— Every such private road when so laid out, shall be for the use of such applicant, his heirs and assigns; but not to be converted to any other use or purpose than that of a road; nor shall the occupant or owner of the land through which said road shall be laid out, be permitted to use the same as a road, unless he shall have signified such intention to the jury who assessed the damages for laying out such road, and before such damages were assessed.

Revised from 1 R. S., ch. 16, tit. 1, art. 4, § 79.

That a private road is for the exclusive use of the applicant unless an occupant or owner of the land through which such road shall have

been laid out signified his intention to use it at the time it was laid out and at the time damages were assessed. See Lambert v. Hoke, 14 Johns., 383; Taylor v. Porter, 4 Hill, 140.

The public cannot use it except when on business with the owner or upon lawful occasion to go upon the lands benefited. Taylor v. Porter, *supra*.

Rights of owner of lands as to keeping persons out of a private road which he has constructed over such lands. People v. Moore, 50 Hun, 356.

The penalty provided in cases where public highways are obstructed does not apply to the obstruction of private roads. Fowler v. Lansing, 9 Johns., 349; see, also, Drake v. Rogers, 3 Hill, 604.

§ 122. **Highways or roads along division lines.**—Whenever a highway or private road shall be laid along the division line between lands of two or more persons, and wholly upon one side of the line, and the land upon both sides is cultivated or improved, the persons owning or occupying the lands adjoining such highway or road, shall be paid for building and maintaining such additional fence as they may be required to build or maintain, by reason of the laying out and opening such highway or road; which damages shall be ascertained and determined in the same manner that other damages are ascertained and determined in the laying out of highways or private roads.

Revised from L. 1853, ch. 174, § 16.

It has been held that an abutter is never *required* to maintain any fence along the highway; but that testimony as to the cost of the fencing which an abutter may find it to his advantage to maintain along the new highway is admissible. Matter of Pugh, 22 Misc., 43; reversed in 46 App. Div., 634, but without discussing this point.

§ 123. **Adjournments.**— If any accident shall prevent any of the proceedings required by this chapter relating to the laying out, altering or discontinuing of a highway, or the laying out a private road, to be done on the day assigned, the proceedings may be adjourned to some other day, and the commissioner shall publicly announce such adjournment.

Revised from L. 1853, ch. 174, § 13.

ARTICLE V.

BRIDGES.

Section 130. Liability of towns for construction and care of bridges. Liability of counties.*
131. [Rep. by Co. L.]
132. Statement of expenses.
133. Supervisors to levy tax.
134. Joint liability of towns, and their joint contracts.
135. Refusal to repair.
136. Proceedings in court.
137. Commissioners to institute proceedings.
138. Their duty.
139. Commissioners to report.
140. Appeals.
141. Power of court on appeal.
142. Refusal to repair bridge.
143. Penalty, and notice on bridge.
144. Offense.
145. Iron bridges.

§ 130. **Liability of towns for construction and care of bridges. Liability of counties.**— The towns of this state, except as otherwise herein provided, shall be liable to pay the expenses for the construction and repair of its public free bridges constructed over streams or other water within their bounds, and their just and equitable share of such expenses when so constructed over streams or other waters upon their boundaries, except between the counties of Westchester and New York; and when such bridges are constructed over streams or other waters forming the boundary line of towns, either in the same or adjoining counties, such towns shall be jointly liable to pay such expenses. When such bridges are constructed over streams or other waters forming the boundary line between a city of the third class and a town, such city and town shall be liable each to pay its just and equitable share of the expenses for the construction, maintenance and repair of such bridges. Except as otherwise provided by law, a city of the third class shall be deemed a town for the purposes of this article. Each of the counties of this state shall also be liable to pay for the

* Statutory Construction Law, § 34.

construction, care, maintenance, preservation and repair of public bridges, lawfully constructed over streams or other waters forming its boundary line, not less than one-sixth part of the expenses of such construction, care, maintenance, preservation and repair.

Revised from L. 1883, ch. 346, §§ 1, 4-6; amd. L. 1895, ch. 416, and L. 1902, ch. 321, in effect April 2, 1902.

As to repair of bridges generally, see § 4, subds. 1, 9, *ante.*

As to extraordinary repairs, etc., to bridges, see §§ 10, 11, *ante.*

As to liability for defective bridges, see § 16, *ante.*

As to repair of toll bridges, see § 13, *ante.*

As to equality of shares of expense and proceedings to compel construction or repair of bridges, see §§ 134-136, *post.*

As to payment for iron bridge, see § 145, *post.*

Raising additional funds for the construction and repair of bridges, § 9, *ante*, and see County Law, §§ 69, 70, pages 173, 174, *post.*

Powers of supervisors over bridges generally, County Law, §§ 60-70, pages 169-174, *post;* also §§ 184-186, *post.*

That a county may render aid to a town for the construction and repair of bridges, see County Law, §§ 61, 63, 64, pages 169-171, *post.*

Special act with reference to towns one-quarter of whose territory has been taken for park purposes and which adjoin a city of one and one-half millions population. L. 1897, ch. 269.

Duty of railroad as to bridges over its tracks and its bridges over highways. Railroad Law, § 64; Bush v. D., L. & W. R. R. Co., 166 N. Y., 210.

The general scope of this section is: first, to declare the general liability of towns in respect to its highways (?) and bridges; second, to declare the liability of towns as between themselves as to bridges constructed upon boundary lines; third, to impose upon the county a fixed liability for a part of the expense; and, fourth, to impose an added liability as to bridges erected on county lines. (The provision for county aid was repealed in 1895.) People ex rel. Root v. Bd. Supervisors, 146 N. Y., 107.

A town acts as a sovereign power in building a public bridge over navigable waters and in the absence of statute is not liable for damages occasioned to property thereby. Hall v. Town of Oyster Bay, 61 App. Div., 508; but see Huffmire v. City of Brooklyn, 162 N. Y., 584.

The liability of a county to pay at least one-third of the excess of the construction and repair of bridges over and above one-sixth of one per cent. of the assessed valuation of the property in a town, as it existed before the amendment of § 130 of the Highway Law by ch. 416 of the L. 1895, was not affected by that act as regards bridges completed twenty-six days before such act went into effect, but save as to bridges constructed during the continuance of that section unamended there is no liability upon counties to contribute toward the expense of bridges not on their borders. Stone v. Board of Supervisors, 166 N. Y., 85.

But neither a town nor a county need contribute to the expense of building a bridge unless it connects two passable highways. Beckwith et al. v. Whalen, 70 N. Y., 430; People ex rel. Keene v. Supervisors, 151 N. Y., 190, and see Town of Candor v. Town of Tioga, 11 App. Div., 502.

Authority to repair highways includes authority to build a bridge to connect highways. Huggans v. Riley, 125 N. Y., 88.

It was held in Matter of Freeholders of Irondequoit (68 N. Y., 376) that by the former acts there was no authority conferred as to bridges over bays, or lakes, or other bodies of water between towns, except streams, but this decision is no longer applicable, as § 130 expressly includes bridges over all waters.

And see as to a bridge built across a canal by a railroad company. Briggs v. N. Y. C. & H. R. R. R. Co., 30 Hun, 291.

Consent of commissioners of both towns to crossing a joint bridge with railroad, is necessary. Wheatfield v. Tonawanda St. R. R. Co., 92 Hun, 460.

And if a town is sued to recover for injuries sustained for defects in a bridge which is required to be kept by a private owner, it will be subrogated to the rights of the plaintiff and may recover over against the individual owner. Town of Clay v. Hart, 25 Misc., 110; affd., 41 App. Div., 625.

See, as declaratory of the statute as to joint liability, and as to duty to maintain approaches of a joint bridge, Edwards v. Ford, 22 App. Div., 277.

A town is not liable for defects in a bridge which was temporarily put up by the commissioners of highways acting as a volunteer and not in his official capacity upon private property to take the place of a public bridge which had been carried out by a freshet. Ehle v. Town of Minden, 70 App. Div., 275.

It has been held that a board of supervisors may compel two towns to bridge a stream which separates them and may levy a tax upon the said towns to meet the expense thereof. Town of Newkirk v. Newbury et al., 122 N. Y., 571.

The rule seems to be that where a bridge built by private enterprise remains a private bridge, the town should not be held liable for its defect, but where it is adopted by the public then the town may be liable. If the act of the builder has created the necessity of a highway bridge in a theretofore unbridged spot, he must keep it in repair, while if he bridges in a spot which does not interfere with the highway, and the public comes to his bridge, an acceptance by the authorities will be presumed, and they must make the repairs. Heacock v. Sherman, 14 Wend., 58; Dygert v. Schenck, 23 Wend., 466; Babcock v. N. Y. C. & H. R. R. R. Co., 20 Week. Dig., 477; Town of Clay v. Hart, 25 Misc., 110; affd. 41 App. Div., 625; Elliott, Roads and Streets (2d ed.), §§ 28, 57, 59.

§ 131. [This section was repealed by the county law. L. 1892, chap. 686.]

See § 63 of that law, page 170, *post.*

§ 132. **Statement of expenses.**— The commissioners of highways of every town in which the whole or any part of any free bridge may be, shall make and deliver to the supervisor of the town, on or before the first day of November in each year, a written statement, verified by one of them, containing a description of such bridge, the whole expense in items incurred by the town during the year preceding for its construction or repair.

Revised from L. 1883, ch. 346, § 2.

For form of statement required by this section, see No. 110, *post.*

See Town of Wirt v. Supervisors, 90 Hun, 205.

§ 133. **Supervisors to levy tax.**— Every supervisor to whom such statement is delivered shall present the same to the board of supervisors of his county at its next annual session thereafter, and the board of supervisors shall levy upon the taxable property of the county a sum sufficient to pay its proportion of such expense and the same when collected shall be paid to the commissioners of highways of such town to be applied toward the payment of such expense.

Revised from L. 1883, ch. 346, § 3.

The payments to commissioners of highways must be made to their treasurer, if any. § 2, *ante.*

Levying expenses in other cases, §§ 139, 142, *post.*

As to the amount of a county's share of these expenses, see § 130, *ante,* and County Law, §§ 61, 63, 64, pages 169-171, *post.*

It seems that the board of supervisors may audit and determine the amount which has been expended during the year by the commissioners of highways. Town of Salamanca v. Cattaraugus Co., 81 Hun, 282.

§ 134. **Joint liabilities of towns, and their joint contracts.**— Whenever any two or more towns shall be liable to make or maintain any bridge or bridges, the same shall be built and maintained at the joint expense of such towns, without reference to town lines. The commissioners of highways of all the towns, or of one or more

of such towns, the others refusing to act, may enter into a joint contract for making and repairing such bridges.

Revised from L. 1841, ch. 225, §§ 1, 2, and L. 1857, ch. 383, §§ 1, 2.

As to when towns are jointly liable to build and repair bridges, see § 130, *ante*.

Act to provide for the construction of bridges in certain cities and towns or incorporated villages in said towns. L. 1897, ch. 269, as amd. by L. 1898, ch. 591, and L. 1899, ch. 232.

Contracts made under this and the following sections bind the towns to pay their respective portions. The amounts paid for these repairs cannot, after being informally presented for audit and included by the town board in their certificate of the amount necessary to be raised for highway purposes, and the commissioner's accounts approved be recovered back under L. 1887, ch. 673, as amd. by L. 1892, ch. 301, though the commissioner's procedure was somewhat irregular. Edwards v. Ford, 22 App. Div., 277.

See Beckwith et al. v. Whalen and cases following in notes to § 130, *ante*.

A provision that a bridge shall be built and maintained at the joint expense of towns regardless of town lines, means that the expense shall be shared equally, regardless of the proportion located in either town. Lapham v. Rice, 55 N. Y., 472.

§ 135. **Refusal to repair.**— If the commissioners of highways of either of such towns, after notice in writing from the commissioners of highways of any other of such towns, shall not within twenty days give their consent in writing to build or repair any such bridge, and shall not within a reasonable time thereafter do the same, the commissioners of highways giving such notice may make or repair such bridge, and then maintain an action in the name of the town, against the town whose commissioners neglect or refuse to join in such making or repairing, and in such action, the plaintiffs shall be entitled to recover so much from the defendant, as the town would be liable to contribute to the same, together with costs and interest.

Revised from L. 1841, ch. 225, §§ 3, 4, and L. 1857, ch. 383, § 3.

As to extraordinary repairs of bridges located in one town only, see §§ 10, 11, *ante*.

As to repair of bridges generally, see § 4, subds. 1, 9; § 16, *ante*.

As to repair of toll bridges, see § 13, *ante*.

As to refusal to repair, see also § 142, *post*.

As to proceeding to compel construction or repair, see §§ 136, 137, *post*.

For form of notice under this section, see No. 111, *post.*

For form of consent under this section, see No. 112, *post.*

Where a town has by mistake paid more than its proportion, the excess may be recovered of the town that did not pay its full share. Surdam v. Fuller, 31 Hun, 500; Corey v. Rice, 4 Lans., 141; but see Flynn et al. v. Hurd, 118 N. Y., 19.

If a commissioner repair a bridge without giving notice as provided by the statute to the commissioners of the other towns jointly liable, or if the other commissioners consent after notice and unite in the work, the commissioner giving the notice cannot recover the portion of the expense chargeable to the other towns, because, in the first case, he has failed to comply with the requirements of the statute, or, in the second case, the commissioners' consent and performance has taken the case out of the statute. Flynn et al. v. Hurd, 118 N. Y., 19.

But the service of the notice may be waived and where an application for co-operation is met by an absolute refusal to join in the repairs when they may become necessary the requirement of notice is waived. Day v. Day, 94 N. Y., 153; see, also, Clapp v. Town of Ellington, 87 Hun, 542; affd. 154 N. Y., 781.

§ 136. **Proceedings in court.**— Whenever any adjoining towns shall be liable to make or maintain any bridge over any streams dividing such towns, whether in the same or different counties, three freeholders in either of such towns may, by petition signed by them, apply to the commissioners of highways in each of such towns, to build, rebuild or repair such bridge, and if such commissioners refuse to build, rebuild or repair such bridge within a reasonable time, either for want of funds or any other cause, such freeholders, upon affidavit and notice of motion, a copy of which shall be served on each of the commissioners, at least eight days before the hearing, may apply to the supreme court at a special term thereof, to be held in the judicial district in which such bridge, or any part thereof, shall be located, for an order requiring such commissioners to build, rebuild or repair such bridge, and the court upon such motion may, in doubtful cases, refer the case to some disinterested person to ascertain the requisite facts in relation thereto, and to report the evidence thereof, to the court. Upon the coming in of the report, in case of such reference, or upon or after the hearing of the motion, in case no such reference shall be ordered, the court shall make an order thereon as the justice of the case shall require. If the motion be granted in whole

or in part, whereby funds shall be needed by the commissioners to carry the order into effect, such court shall specify the amount of money required for that purpose, and how much thereof shall be raised in each town.

Revised from L. 1857, ch. 639, §§ 1, 2.

As to when towns are jointly liable to make and maintain bridges, see § 130, *ante*.

For form of petition and refusal under this section, see Nos. 113, 114, *post*.

Notice of motion, affidavit and order, Nos. 115-117, *post*.

§ 137. **Commissioners to institute proceedings.**— The commissioners of highways of any such town, may institute and prosecute proceedings under this chapter, in the name of the town, to compel the commissioners of such adjoining towns, to join in the building, rebuilding or repair of any such bridge, in like manner as freeholders are hereby authorized.

Revised from L. 1857, ch. 639, § 3.

Institution of these proceedings by freeholders, § 136, *ante*.

§ 138. **Their duty.**— The order for building, rebuilding or repairing a bridge being made, and a copy thereof being served on the commissioners of highways of such adjoining towns respectively, the commissioners of highways of such towns shall forthwith meet and fix on the plan of such bridge, or the manner of repairing the same, and shall cause such bridge to be built, rebuilt or repaired out of any funds in their hands applicable thereto; and if an adequate amount of funds are on hand, they shall cause the same to be built, rebuilt or repaired upon credit, or in part for cash and in part upon credit, according to the exigency of the case; and the commissioners may enter into a contract for building, rebuilding or repairing such bridge, pledging the credit of each town for the payment of its appropriate share, so far as the same shall be upon credit.

Revised from L. 1857, ch. 639, § 4.

See, as declaratory of the section, Matter of Certain Freeholders, 46 Hun, 620.

§ 139. **Commissioners to report.**— The commissioners of highways of each town, shall make a full report of their pro-

ceedings in the premises to the town board, at the time of making their annual report. They shall attach to the copy of the order granted by the supreme court, an accurate account under oath, of what has been done in the premises, and deliver the same to the supervisor of their town. The board of supervisors at their annual meeting, shall levy a tax upon each of such towns, when in the same county, and upon the appropriate town when in different counties, for its share of the costs of building, rebuilding or repairing such bridge, after deducting all payments actually made by the commissioners thereon; which tax, including prior payments, shall in no case exceed the amount specified in the order.

Revised from L. 1857, ch. 639, § 5.
Annual report of commissioners of highways. § 19, *ante*.
General method of levying expenses, § 133, *ante*, and § 142, *post*.
Provisions as to order referred to in this section, § 136, *ante*.
Form of report and account under this section, Nos. 34-35, *post*.

§ 140. **Appeals.**— Either party aggrieved by the granting or refusing to grant such order by the court at special term, may appeal from such decision to the general term of the supreme court for the review of the decision. The general term may alter, modify or reverse the order, with or without costs.

Revised from L. 1857, ch. 639, § 6.
This section has not followed the change of the General Term of the Supreme Court into the Appellate Division.

§ 141. **Power of court on appeal.**— The special term may grant or refuse costs as upon a motion, including also witnesses' fees, referees' fees and disbursements. The appeal provided for in the last preceding section, shall conform to the practice of the supreme court, in case of appeal from an order of a special term, to the general term.

Revised from L. 1857, ch. 639, § 7.
Here again the statute has not followed the change of the General Term of the Supreme Court into the Appellate Division.

§ 142. **Refusal to repair bridge.**— Whenever any such bridge shall have been or shall be so out of repair as to render it unsafe for travelers to pass over the same, or whenever any such bridge

shall have fallen down, or been swept away by a freshet or otherwise, if the commissioners of highways of the adjoining towns, after reasonable notice of such condition of the bridge, have neglected or refused, or shall neglect or refuse to repair or rebuild it, then whatever funds have been or shall be necessarily or reasonably laid out or expended in repairing such bridge, or in rebuilding the same, by any person or corporation, shall be a charge on such adjoining towns, each being liable for its just proportion; and the person or corporation who has made such expenditure, or shall make such expenditures, may apply to the supreme court, at a special term, for an order requiring such towns severally to reimburse such expenditures, which application shall be made by serving papers upon the commissioners of highways of each of such towns at least eight days; and the court may grant an order requiring each of the adjoining towns to pay its just proportion of the expenditure, specifying the same; and the commissioners of highways in each of such towns shall forthwith serve a copy of such order upon the supervisor of each of their towns, who shall present the same to the board of supervisors, at their next annual meeting. The board of supervisors shall raise the amount charged upon each town by the order, and cause the same to be collected and paid to such persons or corporation as incurred the expenditure. The order shall be appealable.

Revised from L. 1857, ch. 639, § 8.
General duty to repair bridges, § 4, subds. 1, 9, *ante*.
Extraordinary repairs of bridges located in one town only, §§ 10-11, *ante*.
Repair of toll bridges, § 13, *ante*.
Liability for defective bridges, § 16, *ante*.
General method of levying expenses of repairs, etc., § 133, 139, *ante*.
Refusal to repair, see, also, § 135, *ante*.

§ 143. **Penalty, and notice on bridge.**— The commissioners of highways may fix and prescribe a penalty, not less than one, nor more than five dollars, for riding or driving faster than a walk on any bridge in their town, whose chord is not less than twenty-five feet in length and put up and maintain in a conspicuous place at each end of the bridge, a notice in large characters, stating each penalty incurred.

Revised from 1 R. S., ch. 16, tit. 1, art. 6, § 122; L. 1873, ch. 477, §§ 1, 2, and L. 1875, ch. 22, § 1.

Recovery of penalties generally, § 164, *post*.

Penalty for fast driving upon or overloading of canal bridges. Canal Law, § 176.

§ 144. **Offense.**— Whoever shall ride or drive faster than a walk over any bridge, upon which notice shall have been placed, and shall then be, shall forfeit for every offense, the amount fixed by such commissioners, and specified in the notice.

Revised from 1 R. S., ch. 16, tit. 1, art. 6, §§ 123, 124; L. 1873, ch. 477, § 3; L. 1875, ch. 22, § 2.

Recovery of penalties generally, § 164, *post*.

§ 145. **Iron bridges.**— No town or its officers shall be compelled to accept or pay for an iron or steel bridge exceeding two hundred feet in length, or having a span or spans exceeding one hundred feet in length, constructed therein or upon its borders, until the state engineer and surveyor shall certify to the completion of the bridge, pursuant to the contract under which it shall have been constructed, with his approval of the manner of its construction and the material thereof; and all contracts made for the construction of any such bridge, shall be subject to the provisions of this section.

New.

Construction and repair of bridges generally, §§ 130-142, *ante*.

In an action to recover for the expense of constructing an iron bridge of this kind, the burden rests upon the plaintiff to show a compliance with this section. Town of Candor v. Town of Tioga, 11 App. Div., 502.

ARTICLE VI.

MISCELLANEOUS PROVISIONS.

Section 150. Papers, where filed.
151. When commissioners do not act.
152. Costs on motion.
153. Injuries to highways.
154. When town not liable for bridge breaking.
155. Steam traction engine on highway.
156. Trees, to whom they belong.

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158. Intemperate drivers.
159. Drivers, when to be discharged.
160. Leaving horses without being tied.
161. Owners of certain carriages liable for acts of drivers.
162. Term "carriage" defined.
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165. Extent of this chapter.*
165. Stone and rubbish not to be dumped in highways.
166. Registration by owners of automobiles.
167. Use of highways by automobiles.
168. Brakes and lamps on automobiles.
169. Stop automobile on signal.
169a. Licenses or permits for automobiles.
169b. Penalties.

§ 150. **Papers, where filed.**— All applications, certificates, appointments and other papers relating to the laying out, altering or discontinuing of any highway shall be filed by the commissioners of highways as soon as a decision shall have been made thereon in the town clerk's office of their town.

Revised from 1 R. S., ch. 16, tit. 1, art. 4, § 83; see L. 1880, ch. 114, § 2.

Additional provisions for filing papers, §§ 98, 116, *ante*.

The applications, certificates and orders filed or filed and entered pursuant to this section become public records and prove themselves. Van Bergen v. Bradley, 36 N. Y., 316.

§ 151. **When commissioners do not act.**— When any commissioner or other officer appointed by a court under this chapter shall neglect or be prevented from serving, the court which appointed him shall appoint another in his place.

New.

§ 152. **Costs on motion.**— Costs of a motion to confirm, vacate or modify the report of commissioners appointed by the court to lay out, alter or discontinue a highway may be allowed in the discretion of the court not exceeding fifty dollars. Costs of any other motion in a proceeding in a court of record, authorized by

* So in the original.

this chapter, may be allowed in the discretion of the court not exceeding ten dollars.

New.

See People ex rel. Bevins v. Supervisors of Warren, 82 Hun, 298, in notes to § 92, *ante*.

Additional provisions as to costs of motions, §§ 92, 119, *ante*.

§ 153. **Injuries to highways.**— Whoever shall injure any highway or bridge maintained at the public expense, by obstructing or diverting any creek, water-course or sluice, or by dragging logs or timber on its surface, or by any other act, or shall injure, deface or destroy any mile-stone or guide-post erected on any highway, shall for every such offense, forfeit treble damages.

Revised from 1 R. S., ch. 16, tit. 1, art. 7, §§ 128-130.

For law and practice, see notes to § 15, *ante*.

Recovery of penalties generally, § 164, *post*.

Mile-stones and guide-posts generally, § 5, *ante*, and notes.

Penal liability, Penal Code, § 385, subd. 3; §§ 639, 640.

§ 154. **When town not liable for bridge breaking.**— No town shall be liable for any damage resulting to person or property, by reason of the breaking of any bridge, by transportation on the same, of any vehicle and load, together weighing four tons or over; but any owner of such vehicle or load, or other person engaged in transporting or driving the same over any bridge, shall be liable for all damages resulting therefrom.

Revised from L. 1887, ch. 526, § 1; L. 1890, ch. 210.

Liability for defective highways and bridges generally, § 16, *ante*.

This section does not apply to bridges which it is the duty of railroad companies to maintain. Bush v. D., L. & W. R. R. Co., 166 N. Y., 210.

The defense afforded by this section is an affirmative one and must be proved by the defendant. Vandewater v. Town of Wappinger, 69 App. Div., 325.

It seems that where a traction engine is drawing another vehicle connected with it by a pole that they may be considered as a "vehicle and load." Heib v. Town of Big Flats, 66 App. Div., 88; Vandewater v. Town of Wappinger, 69 App. Div., 325; but see *contra dicta* in Bush v. D., L. & W. R. R. Co., 166 N. Y., 210, 217.

The added weight upon the bridge caused by the effort of the engine in hauling a thresher not yet upon the bridge may be shown upon the

question of total burden upon the bridge. Heib v. Town of Big Flats, *supra;* see also Vandewater v. Town of Wappinger, *supra.*

§ 155. **Steam traction engines on highway.**— The owner of a carriage, vehicle or engine, propelled by steam, his servant or agent, shall not allow, permit or use the same to pass over, through or upon any public highway or street, except upon railroad tracks, unless such owners, or their agents or servants, shall send before the same, a person of mature age, at least one-eighth of a mile in advance, who shall notify, and warn persons traveling or using such highway or street, with horses or other domestic animals, of the approach of such carriage, vehicle or engine; and at night such person shall carry a red light, except in incorporated villages and cities. This section shall not apply to any carriage or motor vehicle, propelled by steam, developing less than twenty-five horse power, other than a steam traction engine.

Revised from L. 1886, ch. 269, §§ 1, 3; amd. L. 1901, ch. 531, § 1.

For provisions making violation of this section a misdemeanor, see Penal Code, § 640.

As to sending a person ahead of a steam road roller to warn travelers, see Mullen v. Village of Glens Falls, 11 App. Div., 275; Paine v. The City of Rochester, 37 N. Y. S. R., 587.

As to steam rollers in streets generally, see Rector v. Syracuse Rapid Transit R. Co., 66 App. Div., 395; and Halstead v. Village of Warsaw, 43 App. Div., 39.

One who after having been warned of the defective condition of a bridge rides upon it on a traction engine is guilty of contributory negligence. Spencer v. Town of Sardinia, 42 App. Div., 472.

It had been held before the amendment of 1901, that the provision as to sending a person one-eighth of a mile in advance did not apply to automobiles. Nason v. West, 31 Misc., 583.

§ 156. **Trees, to whom they belong.**— All trees standing or lying on any land over which any highway shall be laid out, shall be for the proper use of the owner or occupant of such land, except such of them as may be requisite to make or repair the highway or bridges on the same land.

Revised from 1 R. S., ch. 16, tit. 1, art. 7, § 126.

Right to use trees for making repairs in highways, see notes under § 4, subd. 1, *ante.*

Abatement of highway taxes for planting shade trees, §§ 43, 44, *ante*.

Penalty for leaving horses near to or the destruction or mutilation of trees. L. 1875, ch. 215, as amd. by L. 1881, ch. 344; Penal Code, § 640; see also Village Law, § 89, sub. 8.

For a full consideration of the entire question of the rights of the abutter, and of the municipality as to trees in streets, see opinion of Yeoman, J., in Ellison v. Allen et al., 30 N. Y. Supp., 441; 62 N. Y. S. R., 274.

Trees are the property of the abutter, if he is the owner of the fee of the street, and he may remove them at his pleasure, notwithstanding a municipal ordinance against injury to shade trees. The Village of Lancaster v. Richardson, 4 Lans., 136; Ellison v. Allen et al., 30 N. Y. Supp., 441; 62 N. Y. S. R., 274.

And he may restrain their removal where it would work irreparable injury, unless they are detrimental to the highway, or their removal is necessary for street purposes. Evans v. Board of Street Commissioners, 84 Hun, 206; Ellison v. Allen, *supra*.

As to the right to remove trees where the owner of a tract of land has plotted it and laid it out into lots and streets. Niagara Falls Suspension Bridge Co. v. Bachman, 4 Lans., 523; 66 N. Y., 261.

An abutter who does not own the fee of the highway may, nevertheless, recover damages for injuries to shade trees by third parties, when such trees were planted with the consent of the municipal authorities, and their sanction will be presumed where the trees are shown to have stood for a year. Lane v. Lamke, 53 App. Div., 395; see, also, Gorham v. Eastchester Electric Co., 80 Hun, 290 and McCruden v. Rochester Ry. Co., 5 Misc. 59; affd., 77 Hun, 609, holding that treble damages may be recovered under Code Civ. Proc., §§ 1667, 1668.

The measure of damages is the difference in the value of the premises before and after cutting of the tree. Edsall v. Howell, 86 Hun, 424; Evans v. Keystone Gas Co., 72 Hun, 503; Dwight v. E., C. & N. R. R. Co., 132 N. Y., 199; Hartshorn v. Chaddock, 135 N. Y., 116.

As to trees being an obstruction of a highway, see Town of Wheatfield v. Shasley, 23 Misc., 100; also Edsall v. Howell, 86 Hun, 424, in notes to §104, *ante*.

Right of electric light company to trim trees to clear its wires. Van Sicklen v. Jamaica Electric Light Co., in notes to § 104, *ante*.

§ 157. **[Carriages meeting to turn to the right, etc.]**—(A) Whenever any persons, traveling with any carriages, or riding horses or other animals, shall meet on any turnpike road or highway, the persons so meeting shall seasonably turn their carriages, horses, or other animals to the right of the center of the road, so as to permit such carriages, horses, or other animals to pass without interference or interruption, (under the

penalty of five dollars for every neglect or offence, to be recovered by the party injured).*

(B) Any carriage, or the rider of a horse or other animal, overtaking another shall pass on the left side of the overtaken carriage, horse or other animal. When requested to do so, the driver or person having charge of any carriage, horse or other animal, traveling, shall, as soon as practicable, turn to the right, so as to allow any overtaking carriage, horse or other animal, free passage on his left.

(C) In turning corners to the right, carriages, horses or other animals, shall keep to the right of the center of the road. In turning corners to the left, they shall pass to the right of the centre of intersection of the two roads.

(D) Any person neglecting to comply with or violating any provision of this section shall be liable to a penalty of five dollars to be recovered by the party injured, in addition to all damages caused by such neglect or violation.

Revised from 1 R. S., ch. 20, tit. 13, § 1; amd. L. 1902, ch. 96, in effect March 26, 1902.

The direction to pass to the right of the center of the road means to the right of the center of the worked portion of the road. Earing v. Lansingh, 7 Wend., 185; Pike v. Bosworth, 7 N. Y. S. R., 665.

And in the winter the traveler should go to the right of the center of the beaten or traveled track, when it is difficult by reason of the snow to ascertain the extent of the worked portion. Smith v. Dygert, 12 Barb., 613.

Before the amendment of 1902 travelers on horseback were not within the rule of turning to the right when meeting others on horseback or in vehicles. Dudley v. Bolles, 24 Wend., 465.

Nor were pedestrians meeting vehicles within the rule. Savage v. Gerstner, 36 App. Div., 220, and see Grant v. City of Brooklyn, 41 Barb., 381. And this rule does not seem to have been changed by the amendment.

Nor have footmen any right of way at a city crossing superior to that of vehicles. Savage v. Gerstner, 36 App. Div., 220.

But wheelmen are within the rule as to vehicles and are entitled to the right side of the road. Quinn v. Pietro, 38 App. Div., 484; Schimpf v. Sliter, 64 Hun, 463.

The fact that it is more difficult for one party to turn than another

* So in the original.

will not excuse his failure to observe the rule of the road, unless the difficulty is so great as to render it nearly impossible to observe such rule. Earing v. Lansingh, 7 Wend., 185.

One cannot excuse a violation of the law of the road simply by showing that the violation was for the purpose of turning into a road which he was approaching. Heffernan v. Barber's Son, 36 App. Div., 163.

But he may excuse such a violation by showing that there was an obstruction upon the right-hand side of the road. Quinn v. O'Keefe, 9 App. Div., 68; Mooney v. Trow Directory Printing and Bookbinding Co., 2 Misc., 238.

A person violating the rule of the road is presumptively liable for resulting accidents. Burdick v. Worrall, 4 Barb., 596; Pike v. Bosworth, 7 N. Y. S. R., 665; Simmonson v. Stellenmerf, 1 Edm. Sel. Cas., 194; Savage v. Gerstner, 36 App. Div., 220; Quinn v. O'Keefe, 9 App. Div., 68.

But the rule of the road is not absolute and a defendant is not liable unless his negligence is established. Quinn v. O'Keefe, *supra;* Savage v. Gerstner, 36 App. Div., 220; Newman v. Ernst, 31 N. Y. S. R., 1; 10 N. Y. Supp., 310, and see Heffernan v. Barber's Son, 36 App. Div., 163.

Nor can a plaintiff recover without showing that he endeavored to avoid the accident. Schimpf v. Sliter, 64 Hun, 463, and see Simmonson v. Stellenmerf, 1 Edm. Sel. Cas., 194.

But a plaintiff guilty of a violation of the law of the road may still recover if he clears himself of the charge of contributory negligence. Quinn v. O'Keefe, *supra.*

Mere driving at a high rate of speed is not negligence *per se.* Crocker v. Knickerbocker Ice Co., 92 N. Y., 652; Campbell v. Wood, 22 App. Div., 599.

But it may be when driving among a number of children. Schaffer v. Baker Transfer Co., 29 App. Div., 459; Edsall v. Vandemark, 39 Barb., 589; see also Phelps v. Wait, 30 N. Y., 78.

There is no rule of law absolutely requiring a person to keep his horses in a highway under control, but he must of course use due care to do so, but if they get beyond his control without his fault, he will not be held liable because he was on the left side of the highway at the time of the accident, if he has used all his efforts to keep them upon the right side of the road. Cadwell v. Arnheim, 152 N. Y., 182.

Persons driving along a highway have the right to rely upon the exercise of ordinary care and prudence by others using it. Hartel v. Holland, 19 Week. Dig., 312.

Where two vehicles meet at right angles at the corner of intersecting streets, and one driver signals that he will pass before the other, he has a right to assume, in the absence of contrary indications, that the signal will be obeyed and where, because of a concealed heavy load, the latter does not heed it, and a collision results, he may properly be held for the damage caused. Koester v. Decker, 22 Misc., 353.

As to street cars meeting at right angles. Loudon v. Eighth Avenue R. R. Co., 16 App. Div., 152.

The fact that a colliding vehicle was proceeding at a speed greater than an ordinance allowed may be considered by the jury. Sheehy v. Utah Stage Co., 15 Misc., 21, and see Keck v. Sandford, 2 Misc., 484.

The rule as to passing a vehicle from the rear had been decided before the statute as follows: "If there be sufficient room to pass on either side, it is the duty of the foremost driver to furnish it on request by yielding half the road if practicable, but if not then practicable, it may be deferred until the parties arrive at a place more favorable to its accomplishment." Burnham v. Butler et al., 31 N. Y., 480; Adolph v. Cent. Park, N. & E. Riv. R. R. Co., 76 N. Y., 530; Brennan v. Richardson, 38 App. Div., 463.

And there was no duty for a person passing from the rear to go upon the left side. Savage v. Gerstner, 36 App. Div., 220.

The statute now prescribes the side to which the foremost driver shall turn and the side upon which the rear driver shall pass, and, in accordance with the change in subd. "A" makes the rule applicable to riders of horses or other animals.

It has been held that a person driving along a highway, who knows that a driver approaching from the rear desires to pass him, is bound to use reasonable care to avoid injuring the driver so overtaking him, and if he crowds the rear driver against the curb and overturns his vehicle he is liable for the resulting injuries. Brennan v. Richardson, 38 App. Div., 463, and see Crabtree v. Otterson, 22 App. Div., 393.

The reckless speed of a rear wagon resulting in injury to the vehicle passed may render the rear driver liable. Northridge v. Atlantic Avenue R. R. Co., 15 Misc., 66.

So also when the foremost wagon was drawn up to the curb and was motionless. Axlebrood v. Rosen, 21 Misc., 352.

The statute requiring carriages, when meeting in the highway to turn to the right, has no application to the meeting of railroad cars with common vehicles in the streets of a city and where railroads are laid lengthwise upon a street or highway, it is not unlawful for common vehicles to travel upon the track, across it or lengthwise. Hegan v. Eighth Avenue Railroad Company, 15 N. Y., 380, and see Rooks v. Houston, West St., etc., R. R. Co., 10 App. Div., 98; and cases under next two paragraphs.

An electric car has no paramount right of way at a point where two streets intersect. Huber v. Nassau Electric R. R. Co., 22 App. Div., 426; Buhrens v. Dry Dock, etc., R. R. Co., 53 Hun, 571; affd., 125 N. Y., 702; Bresky v. Third Avenue R. R. Co., 16 App. Div. 83; Hergert v. Union Railway Co., 25 App. Div., 218.

But it has where one street bisects but does not intersect another street. Hewlett v. Brooklyn Heights R. R. Co., 63 App. Div., 423; but see Dunican v. Union Railway Co., 39 App. Div., 497.

The rights of drivers of vehicles and the rights of cable cars are reciprocal. Kennedy v. Third Avenue R. R. Co., 31 App. Div., 30.

See also as to the rights of street cars as regards travel. Hewlett v. Brooklyn Heights R. R. Co., 63 App. Div., 423; Black v. Staten Island Electric R. R. Co., 40 App. Div., 238; Lorickio v. Brooklyn Heights R. R. Co., 44 App. Div., 628; Zingrebe v. Union Railway Co., 44 App. Div., 577; Hickman v. Nassau Electric R. R. Co., 36 App. Div., 376; Dunican v. Union Railway Co., 39 App. Div., 497; Hicks v. Nassau Electric R. R. Co., 47 App. Div., 479.

As to ordinances giving a right of way to ambulances, see Dillon v. Nassau El. R. R. Co., 59 App. Div., 614, and Byrne v. The Knickerbocker Ice Co., 21 N. Y. S. R., 469; affd., 121 N. Y., 700; Penal Code, § 432.

§ 158. **Intemperate drivers not to be engaged.**— No person owning any carriage for the conveyance of passengers, running or traveling upon any highway or road, shall employ, or continue in employment, any person to drive such carriage, who is addicted to drunkenness, or the excessive use of spirituous liquor; and if any such owner shall violate the provisions of this section, he shall forfeit at the rate of five dollars per day, for all the time during which he shall have kept any such driver in his employment.

Revised from 1 R. S., ch. 20, tit. 13, § 2.

See Whitaker v. Eighth Avenue R. R. Co., 51 N. Y., 295, in notes to § 161, *post*.

§ 159. **Drivers, when to be discharged.**— If any driver, while actually employed in driving any such carriage, shall be guilty of intoxication, to such a degree as to endanger the safety of the passengers in the carriage, the owner of such carriage shall, on receiving written notice of the fact, signed by any one of said passengers, and certified by him on oath, forthwith discharge such driver from his employment; and every such owner, who shall retain, or have in his service within six months after the receipt of such notice, any driver who shall have been so intoxicated, shall forfeit at the rate of five dollars per day, for all the time during which he shall keep any such driver in his employment after receiving such notice.

Revised from 1 R. S., ch. 20, tit. 13, § 3.

For recovery of penalties generally, see § 164, *post*.

§ 160. **Leaving horses without being tied.**— No driver of any carriage used for the purpose of conveying passengers for hire, shall leave the horses attached thereto, while passengers remain in the same, without first making such horses fast with a sufficient halter, rope or chain, or by placing the lines in the hands of some other person, so as to prevent their running; and if any such driver shall offend against the provisions of this section, he shall forfeit the sum of twenty dollars.

Revised from 1 R. S., ch. 20, tit. 13, § 5.

For recovery of penalties generally, see section 164, *post*.

That one who leaves a horse unattended in a public street may be guilty of contributory negligence barring his recovery for injury to the horse while so unattended; and that the fact that a defendant left his horse unattended and it ran away is a fact that requires explanation by him in order to free himself from an inference of negligence, see Davis v. Kallfelz, 22 Misc., 602.

§ 161. **Owners of certain carriages liable for acts of drivers.**— The owners of every carriage running or traveling upon any turnpike, road or highway, for the conveyance of passengers, shall be liable jointly and severally, to the party injured, for all injuries and damages done by any person in the employment of such owners, as a driver, while driving such carriage, whether the accident occasioning such injury or damage be willful or negligent, or otherwise, in the same manner as such driver would be liable.

Revised from 1 R. S., ch. 20, tit. 13, § 6.

At common law the liability of the owner of a vehicle used for the transportation of persons was limited to those injuries resulting from the driver's misjudgment or negligence only, and this while he was engaged on behalf of the owner as a driver. Whitaker v. Eighth Avenue R. R. Co., 51 N. Y., 295.

That this section does not apply to the driver of a street car, see Whitaker v. Eighth Avenue R. R. Co., *supra*.

Nor does it apply to a conductor on a street railway. Isaacs v. Third Avenue R. R. Co., 47 N. Y., 122.

§ 162. **Term "carriage" defined.**— The term "carriage" as used in this article, shall be construed to include stage coaches, wagons, carts, sleighs, sleds, automobiles or motor vehicles, and every other carriage or vehicle used for the transportation of per-

sons and goods, or either of them, and bicycles, tricycles, and all other vehicles propelled by manumotive or pedomotive power, or by electricity, steam, gasoline or other source of energy.

Revised from 1 R. S., ch. 20, tit. 13, § 7, and L. 1887, ch. 704, § 1; amd. L. 1901, ch. 531, § 1.

See Rooks v. Houston, West St., etc., R. R. Co., 10 App. Div., 98, in notes to § 163, *post*.

§ 163. **Entitled to free use of highways.**— The commissioners, trustees, or other authorities having charge or control of any highway, public street, parkway, driveway or place, shall have no power or authority to pass, enforce, or maintain any ordinance, rule or regulation, by which any person using a bicycle or tricycle, an automobile or motor vehicle, whether the same be propelled by steam, gasoline, electricity or other source of energy, shall be excluded or prohibited from the free use of any highway, public street, avenue, roadway, driveway, parkway or place, at any time when the same is open to the free use of persons having and using other pleasure carriages, except upon such driveway, speedway or road as has been or may be expressly set apart by law for the exclusive use of horses and light carriages. The board of supervisors of any county may adopt ordinances regulating the speed of automobiles or motor vehicles on the highways or streets of such county, outside the limits of cities. No ordinance, rule or regulation adopted by the authorities of any municipality in pursuance of this section or of any other law, shall require an automobile or motor vehicle to travel at a slower rate of speed than eight miles per hour, within any city, town or village of the state in the built-up portions thereof, nor at a slower speed than fifteen miles per hour where the same are not built up. An ordinance adopted by a board of supervisors in pursuance of this section, regulating the rate of speed of automobiles or motor vehicles on the highways or streets of such county outside of cities shall supersede any such ordinance adopted by the authorities of a town, or village. But nothing herein shall prevent the passage, enforcement or maintenance of any regulation, ordinance or rule, regulating the use of bicycles or tricycles in highways, public streets, driveways, park-

ways and places, or the regulation of the speed of carriages, vehicles, engines, automobiles, or other motor vehicles in public parks and upon parkways and driveways in the city of New York, under the exclusive jurisdiction and control of the department of parks of said city nor prevent any such commissioners, trustees, or other authorities in any other city from regulating the speed of any vehicle herein described in such manner as to limit and determine the proper rate of speed with which such vehicles may be propelled, nor in such manner as to require, direct or prohibit the use of bells, lamps and other appurtenances, nor to prohibit the use of any vehicle upon that part of the highway, street or parkway, commonly known as the foothpath or sidewalk.

Revised from L. 1887, ch. 704, §§ 1, 3; amd. L. 1901, ch. 531, § 1.

For penal provisions as to driving vehicles and riding bicycles upon sidewalks or sidepaths and driving automobiles at excessive speed, see Penal Code, §§ 652, 652a, 666.

Act to regulate the use of bicycles, tricycles, etc. L. 1899, ch. 634.

For penal provisions as to placing injurious substances in a highway, see Penal Code, § 654a.

That village trustees may license bicyclists to ride on sidewalks and that the village does not thereby necessarily incur a liability for the acts of the licensees. Lechner v. Village of Newark, 19 Misc., 452.

A bicycle may not be ridden upon a sidewalk without authority or necessity, whether in a city, or village, or in the country, but in order to sustain a conviction, it is necessary to show that the sidewalk was on a public highway. People v. Meyer, 26 Misc., 117.

And that the act was wilful and unlawful. Id.; Fuller v. Redding, 16 Misc., 634; 13 App. Div., 61.

It was held before this statute that it was the duty of the driver of an automobile to stop his vehicle under circumstances indicating the likelihood of danger to others. The same case also considers the general duties of an automoblist that would be controlling upon general principles under the present statute. It says that the driver must exercise "that degree of prudence in the management and consideration for the rights of others which is consistent with safety." Knight v. Lanier, 69 App. Div., 454.

That the city park department cannot prevent the use of "The Speedway" by horsemen and landaus during reasonable hours, but may exclude bicycles. See Doll v. Devery, 27 Misc., 149.

A person may lawfully ride a bicycle on a cable "slot." Rooks v. Houston, West St., etc., R. R. Co., 10 App. Div., 98.

§ 164. **Penalties, how recovered.**— All penalties or forfeitures given in this chapter, and not otherwise specially provided for, shall be recovered by the commissioners of highways, in the name of the town in which the offense shall be committed; and when recovered, shall be applied by them in improving the highways and bridges in such town.

Revised from 1 R. S., ch. 16, tit. 1, art. 7, § 131.

As to penalties against overseers generally, see § 22, *ante*.

As to duty of commissioners to prosecute for penalties and general provisions, see § 23, *ante*.

For list of penalties under this act, see index, "Penalties."

Summons must be indorsed with reference to the statute under which the penalty is sought. Hitchman v. Baxter, 34 Hun, 271.

There can be no joint action by towns to recover penalties. The action must be by the town in which the offense was committed. Bradley v. Blair, 17 Barb., 480.

Penalties when recovered do not belong to the commissioner. Albro v. Rood, 24 Hun, 72.

[§ 165. **Extent of this chapter.**— This section has never been enacted, though the schedule of sections shows that it was originally contemplated.]

§ 165. **Stone and rubbish not to be dumped in highways.**— No stone or other rubbish shall be drawn to and deposited within the limits of any highway, except for the purpose of filling in a depression or otherwise improving the highway, with the consent of the commissioner of highways and under the direction of a commissioner or overseer of highways.

Added by L. 1898, ch. 352.

§ 166. **Registration by owners of automobiles.**— Every owner of an automobile or motor vehicle shall, within thirty days after the amendment to this section takes effect, file in the office of the secretary of state a statement of his name and address, with a brief description of the character of such vehicle, and shall pay to the secretary of state a registration fee of one dollar. The secretary of state shall issue to such a person a certificate, stating that he has registered in accordance with this section, and shall cause the names of such persons to be entered in alphabetical order in a book kept for such purpose. Every person hereafter acquiring an auto-

mobile or motor vehicle shall, within ten days after acquiring the same, register with the secretary of state as required by this section. This section shall not apply to a person manufacturing or dealing in automobiles or motor vehicles, except those for his own private use.

Added, L. 1901, ch. 531, § 2.

§ 167. **Use of highways by automobiles.**— No person driving or in charge of an automobile or motor vehicle on any street, avenue, parkway or driveway in this state, shall drive the same at any speed greater than is reasonable and proper, having regard to the traffic and use of the highway, or so as to endanger the life or limb of any person.

Added, L. 1901, ch. 531, § 2.

§ 168. **Brakes and lamps on automobiles.**— Every automobile or motor vehicle shall be provided with good an efficient brakes, and shall also be provided with a suitable bell, horn or other signal. Every automobile or similar motor vehicle shall be so constructed as to exhibit during the period from one hour after sunset to one hour before sunrise, two lamps showing white lights visible within a reasonable distance in the direction towards which the automobile is proceeding, and shall also exhibit a red light visible in the reverse direction. The lamps shall be so placed as to be free from obstruction to light from other parts of said automobile or motor vehicle.

Added, L. 1901, ch. 531, § 2.

§ 169. **Stop automobile on signal.**— Every person driving an automobile or motor vehicle shall at request or signal by putting up the hand, from a person driving or riding a restive horse or horses, or driving domestic animals, cause the automobile to immediately stop and to remain stationary, so long as may be necessary to allow said horses or domestic animals to pass. This provision shall apply to automobiles going either in the same or in an opposite direction.

Added, L. 1901, ch. 531, § 2.

§ 169a. **Licenses or permits for automobiles.**— Any person owning or operating an automobile or motor vehicle, whether the

motive power of the same be electricity, steam, gasoline or other source of energy, except such as are used for public hacks, trucks or other vehicles for hire, shall not be required to obtain any license or permit pursuant to the provisions of any local or municipal resolution or ordinance, or the rules of regulations of any commissioners, trustees, supervisors or other authorities having charge or control of any highway, public street, parkway, driveway or place, or pursuant to the provisions of any municipal charter or any other statute, except as herein contained. Every such automobile or motor cycle shall have the separate initials of the owner's name placed upon the back thereof in a conspicuous place, the letters forming such initials to be at least three inches in height.

Added, L. 1901, ch. 531, § 2.

§ 169b. **Penalties.**— The penalty for violating any of the provisions of section one hundred and sixty-three or sections one hundred and sixty-six to one hundred and sixty-nine-a, both inclusive, relating to automobiles or motor vehicles propelled by electricity, steam, gasoline or other source of energy, shall be not exceeding twenty-five dollars.

Added, L. 1901, ch. 531, § 2.

ARTICLE VII.

REGULATION OF FERRIES.

Section 170. Licenses.
171. Undertaking.
172. Appendages for rope ferries.
173. Superintendent of public works may lease right of passage.
174. When schedule to be posted.

§ 170. **Licenses.**— The county court in each of the counties of this state, or the city court of a city, may grant licenses for keeping ferries in their respective counties and cities, to such persons as the court may deem proper, for a term not exceeding five years. No license shall be granted to a person, other than the owner of the land through which that part of the highway adjoining to the ferry shall run, unless the owner is not a suitable person or shall neglect

to apply after being served with eight days written notice from such other person of the time and place at which he will apply for such license, or having obtained such license, shall neglect to comply with the conditions of the license, or maintain the ferry. Every license shall be entered in the book of minutes of the court by the clerk; and a certified copy thereof shall be delivered to the person licensed. When the waters over which any ferry may be used, shall divide two counties or cities, or a county and city, a license obtained in either of the counties or cities shall be sufficient to authorize transportation of persons, goods, wares and merchandise, to and from either side of such waters.

Revised from 1 R. S., ch. 16, tit. 2, §§ 1-3, 5-9.

Additional provisions as to ferry corporations. Trans. Corp. L., §§ 1-6b.

As to regulation of ferries by boards of supervisors, see County Law, § 78, *post*.

Maintenance of a ferry without authority is a misdemeanor. Penal Code, § 415.

A ferry may not be maintained without legislative authority. Power v. Village of Athens, 99 N. Y., 592; Mayor, etc., of N. Y. v. Starin, 106 N. Y., 1.

But an occasional carrying of passengers across waters to private grounds not connected with a highway is not a violation of § 416, Penal Code. People v. Mago, 69 Hun, 559.

The Legislature may grant to a city exclusive power to establish and regulate ferries, subject to the power of the Legislature to revoke. Aikin v. Western R. R. Co., 20 N. Y., 370; Matter of Union Ferry Co., 98 N. Y., 139.

Or it may make an irrevocable grant thereof. Mayor, etc., of N. Y. v. Starin, 106 N. Y., 1.

But a mere grant of ferry rights does not imply that they are exclusive. Power v. Village of Athens, 99 N. Y., 592.

A ferry may or may not have several termini on one shore. Mayor, etc., N. Y. v. New Jersey Steamboat Nav. Co., 106 N. Y., 28.

That the right to maintain a ferry may be acquired by prescription, see Wiswall v. Wandell, 3 Barb. Ch., 312.

§ 171. **Undertaking.**— Every person applying for such license shall, before the same is granted, execute and file with the clerk of the court his undertaking, with one or more sureties, approved by the court, to the effect that he will attend such ferry with sufficient and safe boats and other implements, and so many men

to work the same as shall be necessary during the several hours in each day, and at such rates as the court shall direct.

Revised from 1 R. S., ch. 16, tit. 2, § 4.

Breach of this undertaking is a misdemeanor. Penal Code, § 415, subd. 2.

§ 172. **Appendages for rope ferries.**— Any person licensed to keep a ferry may, with the written consent of the commissioners of highways of the town where such ferry may be, erect and maintain within the limits of the highways, at such point as shall be designated in such consent, a post or posts, with all necessary braces and appendages, for a rope ferry.

Revised from L. 1861, ch. 30, § 1.

§ 173. **Superintendent of public works may lease right of passage.**— The superintendent of public works may where ferries are now maintained at tide water, lease the right of passage for foot passengers across state lands adjoining tide water for a period not exceeding ten years, on such conditions as he may deem advantageous to the state.

Revised from L. 1884, ch. 359, § 1.

§ 174. **When schedules to be posted.**— Every person licensed to operate or control any ferry in this state, or between this state and any other state, operating from or to a city of fifty thousand inhabitants or over, shall post in a conspicuous and accessible position outside and adjacent to each entrance to such ferry, and in at least four accessible places, in plain view of the passengers upon each of the boats used on such ferry, a schedule plainly printed in the English language, of the rates of ferriage charged thereon, and authorized by law to be charged for ferriage over such ferry. If any such person shall fail to comply with the provisions of this section, or shall post a false schedule, he shall forfeit the sum of fifty dollars for each day's neglect or refusal to post such schedule, or any of them, to be recovered by any person who shall sue therefor, in any court of competent jurisdiction.

This section follows L. 1888, ch. 260; repealed by L. 1889, ch. 489, § 3; amd. L. 1900, ch. 313.

That a failure to post a schedule of ferry rates is a misdemeanor, see Penal Code, § 415a, Trans. Corp. Law, §§ 6, 6a, 6b.

That the provisions as to posting ferry rates does not apply to foreign corporations nor where no statutory rates are fixed, see Blanchard v. Hoboken Land & Imp. Co., 6 N. Y. Supp., 279; 25 N. Y. S. R., 566.

ARTICLE VIII.*

COUNTY SUPERVISION OF HIGHWAYS.**

Section 180. Adoption of article.
181. County engineer; deputy.
182. Duties of county engineer.
183. Contracts for the construction of highways.
184. Construction and repair of bridges.
185. Examination of bridges by county engineer.
186. Issue of town bonds for the erection of bridges.
187. Reports of commissioners of highways.
188. Report of county engineer.
189. Adoption of resolution to return to former system.

§ 180. **Adoption of article.**— The board of supervisors of any county may, by resolution duly passed at an annual or special meeting thereof, adopt the provisions of this article. No part hereof shall be in force or effect in any county, unless such resolution is adopted.

Added, L. 1902, ch. 396, § 1; former § 180 renumbered § 200, id., § 2.

§ 181. **County engineer; deputy.**— There may be a county engineer in every such county who shall be appointed by the board of supervisors thereof in the manner provided by section fifty-five of the highway law; and all the provisions of such section, and of any other act relating to the office of county engineer, shall apply to the county engineer appointed hereunder. The board of supervisors may in its discretion appoint a deputy who shall assist such county engineer in the performance of his duties. The county engineer shall give his entire time and attention to

* Added, L. 1902, ch. 396, § 1, in effect April 7, 1902. Former Art. VIII, renumbered Art. IX, Id., § 2.

** See §§ 54 *et seq.*, *ante*, and notes for other provisions as to county supervisor of highways.

the construction and improvement of highways and bridges in the county, for such portion of the year as the local conditions shall permit of operations, which period shall be fixed by the board of supervisors at the time the appointment is made, and the salary fixed by such board shall be regulated according to the period of time during which such engineer and his deputy will be so employed.

Added, L. 1902, ch. 396, § 1; former § 181 renumbered § 201, id., § 2.

§ 182. **Duties of county engineer.**— The county engineer shall personally examine the various formations and deposits of gravel and stone in his county, for the purpose of ascertaining the materials which are best available for the improvement of the highways therein. He shall obtain from the state engineer and surveyor copies of the specifications and rules and regulations prescribed by him for the improvement and maintenance of highways under statutes provided therefor. The county engineer and the commissioners of highways shall comply with such rules and regulations in all cases where they are suited to local conditions, and to the amount of money which is available in the several towns for highway purposes. The county engineer shall, when called upon by the commissioner of highways of any town in the county, visit and examine such highways as the commissioner may indicate as needing improvement. After such examination the county engineer shall, in consultation with the commissioner of such town, establish grades and give such lines and indicate such means of drainage and methods of improvement as seem to him best suited to the local conditions and the funds available for such improvement. He shall visit the highways which are being improved or constructed, and give such further directions and establish such further lines and grades as are needed for the successful completion of the work. The county engineer shall supervise and direct the maintenance of all highways which have been constructed and improved by state aid, pursuant to the provisions of chapter one hundred and fifteen of the laws of eighteen hundred and ninety-eight, and the acts amendatory thereof, in accordance with directions which shall be given for such maintenance by the

state engineer and surveyor, and such rules and regulations as may be prescribed therefor.

Added L. 1902, ch. 396, § 1; former § 182 renumbered § 202, id., §2.

§ 183. **Contracts for the construction of highways.**— The town board in any town of such county which has adopted the money system, upon the recommendation of the county engineer, may provide that the construction of new highways, or the permanent improvement or reconstruction of existing highways shall be done under contracts. All such contracts shall be awarded in accordance with plans and specifications to be furnished by the county engineer to the lowest responsible bidders, after advertisement once a week for three consecutive weeks in a newspaper publishel in the town where the work is to be performed or, if no newspaper is published therein, in a newspaper published at some other place in the county nearest to such town. All bids for such work shall be opened in public and shall be filed in the office of the town clerk. No such contract shall be awarded, unless it be approved by the county engineer as to its form and sufficiency. The person to whom such contract is awarded shall execute a bond to the town in a sum equal to the amount of the contract, with two or more sureties to be approved by the town board, conditioned for the faithful compliance with the terms of the contract and the plans and specifications, and for a payment of all damages which may accrue to the town because of a violation thereof. When such work is completed pursuant to the terms of such contract and the plans and specifications therefor, and accepted by the county engineer and town board as being in accordance therewith, the cost of the work under the contract shall be paid in the same manner as other town charges. No money shall be paid under such contract, unless a certificate has been issued to the contractor by the county engineer to the effect that the work has been done under and in accordance with the terms of such contract and the plans and specifications. All work under any such contract shall be under the supervision of the county engineer or some person designated by him.

Added, L. 1902, ch. 396, § 1; former § 183 renumbered § 203, id., § 2.

§ 184. **Construction and repair of bridges.**— The work of repairing, improving or erecting bridges in such county shall be done under the general supervision of the county engineer, pursuant to plans prepared by him. The town board may, on the recommendation of the county engineer, provide for the performance of such work by contract, awarded as prescribed in the preceding section. The provisions of the preceding section relating to contracts and payments thereunder shall apply to contracts awarded under this section.

Added, L. 1902, ch. 396, § 1.

§ 185. **Examination of bridges by county engineer.**— The county engineer shall examine all bridges in his county having a span of more than twenty feet, at least once in each year and shall report the condition thereof and make such suggestions and recommendations in respect thereto as he may deem necessary, to the town board, if such bridge is wholly maintained by a town, and if not, to the board of supervisors of his county.

Added, L. 1902, ch. 396, § 1.

§ 186. **Issue of town bonds for the erection of bridges.**— No town in any such county shall issue bonds for the erection or reconstruction of a bridge for more than one thousand dollars, unless a proposition therefor has been submitted and adopted as provided by law, at a biennial or special town meeting duly called therefor, and in no event shall the board of supervisors or town board authorize the issue of bonds, unless such proposition has been adopted.

Added, L. 1902, ch. 396, § 1.

§ 187. **Reports of commissioners of highways.**— The commissioner of highways in each town in any such county shall on or before the first day of November in each year, or at such other times as the board of supervisors of such county may direct, make a written report to the county engineer stating the condition of the highways and bridges in his town and the amount expended thereon under contracts or otherwise during the preceding year,

and such other facts in relation to such highways and bridges as may be required by the county engineer. The form of such report shall be prescribed by the county engineer. A copy of such report shall be filed in the office of the town clerk.

Added, L. 1902, ch. 396, § 1.

§ 188. **Report of county engineer.**— The county engineer shall report to the board of supervisors at its annual session:

1. The condition of the highways in the several towns of his county.

2. The amount expended by the several towns under contracts for the construction and improvement of highways.

3. The amount raised in each town for general highway purposes, and generally the manner in which the amount so raised has been expended.

4. The condition of the bridges in the several towns of his county, and the amount expended thereon under contracts approved by him.

5. Suggestions and recommendations as to methods of highway construction and repairs, which will best promote the permanent improvement and better condition of the highways in his county.

6. Such other matters in connection with the highways and bridges of his county as may seem to him of importance.

The board of supervisors may require a further report or other information concerning the highways and bridges of such county.

Added, L. 1902, ch. 396, § 1.

§ 189. **Adoption of resolution to return to former system.**— At any time after the expiration of five years from the passage of a resolution adopting the provisions of this article, a resolution may be passed by such board of supervisors at its annual meeting to return to the former system of controlling and regulating the affairs of the towns of such county, relating to highways

and bridges. Upon the adoption of such resolution the office of county engineer shall be abolished, and the provisions of the highway law and all other statutes relating to highways and bridges shall be applicable to the highways and bridges of such county as if the board of supervisors thereof had not adopted the provisions of this article.

Added, L. 1902, ch. 396, § 1.

ARTICLE IX.*

REPEALING AND OTHER LAWS.

Section 200.** Laws repealed.
201.** Saving clause.
202.** Construction.
203.** When to take effect.
Schedule.

§ 200. **Laws repealed.**— Of the laws enumerated in the schedule hereto annexed, that portion specified in the last column is repealed. Such repeal shall not revive a law repealed by any law hereby repealed, but shall include all laws amendatory of the laws hereby repealed.

Formerly § 180, renumbered L. 1902, ch. 396, § 2.

§ 201. **Saving clause.**— The repeal of a law, or any part of it specified in the annexed schedule, shall not affect or impair any act done, or right accruing, accrued, or acquired, or penalty, forfeiture, or punishment incurred prior to the time when this act takes effect, under or by virtue of the laws so repealed, but the same may be asserted, enforced, prosecuted, or inflicted, as fully and to the same extent, as if such laws had not been repealed; and all actions or proceedings, civil or criminal, commenced under or by virtue of the laws so repealed and pending February twenty-eighth, eighteen hundred and ninety-one, may be prosecuted and defended to final effect in the same manner as they might under

* Formerly Art. VIII; renumbered, L. 1902, ch. 396, § 2.
** See Stat. Const. L., § 34.

the laws then existing, unless it shall be otherwise specially provided by law.

Formerly § 181, renumbered L. 1902, ch. 396, § 2.

See Edsall v. Howell, 86 Hun, 424, and Town of Wheatfield v. Shasley, 23 Misc., 100.

§ 202. **Construction.**— The provisions of this chapter, so far as they are substantially the same as those laws existing on February twenty-eighth, eighteen hundred and ninety-one, shall be construed as a continuation of such laws, modified or amended, according to the language employed in this chapter, and not as new enactments; and references in laws not repealed to provisions of law incorporated into this chapter and repealed, shall be construed as applying to the provisions so incorporated: Nothing in this chapter shall be construed to amend or repeal any provision of the Penal or Criminal Code.

Formerly § 182, renumbered L. 1902, ch. 396, § 2.

§ 203. **When to take effect.**— This chapter shall take effect on the first day of March, eighteen hundred and ninety-one.

Formerly § 183, renumbered L. 1902, ch. 396, § 2.

SCHEDULE OF LAWS REPEALED.

Revised Statutes.. Part I, chapter 16..... All.
Revised Statutes.. Part I, chapter 20, title 13, All.

Laws of	Chapter	Sections
1832	107	All.
1833	149	All.
1832	274	All.
1834	267	All.
1835	154	All.
1836	122	All.
1837	431	All.
1837	431	All.
1840	300	All.
1841	225	All.
1845	180	5, 6, 7, 9, 12, 13, 14.
1847	455	3, 4, 5, 6, 7, 8, 9, 11, 12, 20, 21, 22, 23.
1853	63	All.
1853	135	All.
1853	174	All.
1855	255	All.
1857	383	All.
1857	491	All.
1857	615	1.
1857	639	All.
1858	51	All.
1858	103	All.
1860	61	All.
1860	468	All.
1861	30	All.
1861	311	All.
1862	243	All.
1863	93	All.
1863	444	All.
1864	395	All.
1865	442	All.

Laws of	Chapter	Sections
1865	522	7.
1866	180	All.
1866	770	All.
1868	791	All.
1868	843	All.
1869	24	All.
1869	131	1.
1869	593	All.
1870	461	All.
1872	274	1.
1873	63	All.
1873	69	All.
1873	395	All.
1873	448	All.
1873	477	All.
1873	773	All.
1874	169	All.
1874	570	All.
1875	22	All.
1875	196	All.
1875	341	All.
1876	340	All.
1876	348	All.
1877	197	All.
1877	344	All.
1878	44	All.
1878	49	All.
1878	114	All.
1878	245	All.
1879	67	All.
1880	114	All.
1880	305	All.
1880	308	All.
1880	503	All.
1881	233	All.
1881	513	All.

Laws of	Chapter	Sections
1881	696	All.
1881	700	All.
1883	346	All.
1883	371	All.
1883	398	All.
1884	220	All.
1884	251	All.
1884	359	All.
1884	396	All.
1884	479	All.
1886	269	All.
1886	344	All.
1886	422	All.
1886	452	All.
1887	471	All.
1887	526	All.
1887	704	All.
1888	240	All.
1888	260	All.
1889	120	All.
1889	146	All.
1889	259	All.

Constitutional and General Provisions Relating to Highways.

CONSTITUTION OF THE STATE OF NEW YORK.

Article I.

§ 7. When private property shall be taken for any public use, the compensation to be made therefor, when such compensation is not made by the state, shall be ascertained by a jury, or by not less than three commissioners appointed by a court of record, as shall be prescribed by law. Private roads may be opened in the manner to be prescribed by law; but in every case the necessity of the road and the amount of all damage to be sustained by the opening thereof shall be first determined by a jury of freeholders, and such amount, together with the expenses of the proceedings, shall be paid by the person to be benefited. General laws may be passed permitting the owners or occupants of agricultural lands to construct and maintain for the drainage thereof, necessary drains, ditches and dykes upon the lands of others, under proper restrictions and with just compensation, but no special laws shall be enacted for such purposes.

Article III.

§ 18. The legislature shall not pass a private or local bill in any of the following cases:

* * * * * * *

Laying out, opening, altering, working or discontinuing roads, highways or alleys, or for draining swamps or other low lands.

* * * * * * *

Providing for building bridges, and chartering companies for such purposes, except on the Hudson river below Waterford, and

on the East river, or over the waters forming a part of the boundaries of the state.

* * * * * * *

But no law shall authorize the construction or operation of a street railroad except upon the condition that the consent of the owners of one-half in value of the property bounded on, and the consent also of the local authorities having the control of, that portion of a street or highway upon which it is proposed to construct or operate such railroad be first obtained, or in case the consent of such property owners cannot be obtained, the appellate division of the supreme court, in the department in which it is proposed to be constructed, may, upon application, appoint three commissioners who shall determine, after a hearing of all parties interested, whether such railroad ought to be constructed or operated, and their determination, confirmed by the court, may be taken in lieu of the consent of the property owners.

ARTICLE XIII.

§ 1. Members of the legislature, and all officers, executive and judicial, except such inferior officers as shall be by law exempted shall, before they enter on the duties of their respective offices, take and subscribe the following oath or affirmation: "I do solemnly swear (or affirm) that I will support the constitution of the United States, and the constitution of the state of New York, and that I will faithfully discharge the duties of office of ————, according to the best of my ability;" and all such officers who shall have been chosen at any election shall, before they enter on the duties of their respective offices, take and subscribe the oath or affirmation above prescribed, together with the following addition thereto, as part thereof: "And I do further solemnly swear (or affirm) that I have not directly or indirectly paid, offered or promised to pay, contributed, or offered or promised to contribute any money or other valuable thing as a consideration or reward for the giving or withholding a vote at the election at which I was elected to said office, and have not made any promise to influence the giving or withholding any such vote," and no other oath, declaration or test shall be required as a qualification for any office of public trust.

THE COUNTY LAW.

(L. 1892, ch. 686.)

§ 12. **General powers.**— The board of supervisors shall:

7. Make such laws and regulations as they may deem necessary for the destruction of wild and noxious animals and weeds, within the county.

§ 60. **Limitation of article.**— This article* shall not apply to bridges on the Hudson river below Waterford, or on the East river, or over the waters forming a part of the boundaries of the state.

Special legislation for building bridges allowed over waters excepted by this section, and prohibited elsewhere, Const., art. 3, § 18, page , *ante.*

§ 61. **County highways and bridges.**— A board of supervisors shall, on the application of twenty-five resident tax-payers, when satisfied that it is for the interest of the county, lay out, open, alter, or discontinue a county highway therein, or cause the same to be done, and construct, repair, or abandon a county bridge therein, or cause the same to be done, when the board shall deem the authority conferred on commissioners of highways insufficient for that purpose, or that the interests of the county will be promoted thereby. All expenses so incurred shall be a county charge. Such powers shall not be exercised unless the applicants therefor shall prove to the board the service of a written notice, personally or by mail, on a commissioner of highways of each town in the county, at least twelve days prior to the presentation of such application, specifying therein the object thereof; and when the application is to lay out a highway, or construct a bridge, the route or location thereof; and in all other cases, a designation of the highway or bridge to be affected thereby.

Application and order, forms, Nos. 57, 58, *post.*

§ 62. **Location and construction of bridges.**— The board may authorize the location, change of location and construction of any bridge, applied for by any town or towns, jointly, or by other

* §§ 60-81 hereof.

than a municipal corporation, created under a general law, or by any corporation or individual for private purposes; and if a public bridge, erected other than by a municipal corporation, establish the rates of toll for crossing such bridge; but if such bridge is to cross a navigable stream, provision shall be made in the resolution or permission authorizing the same, for the erection and maintenance of a suitable draw, to prevent any obstruction of the navigation of such stream; and if a private bridge, provision shall be made that the draw shall be kept open as may be required to permit all vessels to pass without loss of headway. When such bridge shall be intersected by the line of counties, the action of the board of supervisors of each county shall be necessary to give the jurisdiction herein permitted. But this section shall not apply to a pier bridge erected or to be erected over the Mohawk river above the state dam by a corporation organized under the transportation corporations law, provided such corporation shall comply with all the provisions of said transportation corporations law applicable thereto; such a corporation, without further proceeding, shall have the right to erect and maintain piers in said river for the purposes of such a bridge.

Amd. L. 1898, ch. 225.

§ 63. **County aid to towns for the construction and repair of bridges.**— If the board of supervisors of any county shall deem any town in the county to be unreasonably burdened by its expenses for the construction and repair of its bridges, the board may cause a sum of money, not exceeding two thousand dollars in any one year, to be raised by the county and paid to such town to aid in defraying such expenses.

§ 64. **Construction by county of destroyed bridges.**— If any bridge within a county, or intersection by any boundary line of a county, shall be destroyed by the elements, and the board of supervisors of the county shall deem that the expenses of the construction of a new bridge at or near the site of the bridge so destroyed would be too burdensome upon the town or towns within such county, which would otherwise be liable therefor, the board of

supervisors of any such county may provide for the construction and completion of a bridge and all necessary approaches thereto, at or near the site of the bridge so destroyed. If the bridge so destroyed shall have been constructed by a corporation created under a general law, and the site thereof, and of the approaches thereto, or either, shall be the property of such corporation, such board of supervisors may purchase the interest of such corporation, or any other person, in such site or approaches, if such purchase can be accomplished upon reasonable terms; but if such site or approaches cannot be lawfully acquired by such purchase, or otherwise, upon reasonable terms, such board may acquire title to premises on either side of such site, and provide for the construction of a bridge and approaches thereto, at such place, at the expense of the county, or of the two counties jointly, as the case may be, provided such bridge shall be so located as not to increase the distance to be traveled upon the highway to reach each end of such bridge more than five rods. Any board of supervisors providing for the construction of any such bridge may determine by resolution whether the expenses of the maintenance and repair thereof shall thereafter be a county charge, or a charge upon such town or towns.

§ 65. **Apportionment of expenses when a bridge is intersected by town or county lines.**— If any public free bridge, intersected by the boundary line of a county, shall also be intersected by the boundary line of two or more towns in such county, the board of supervisors of such county shall apportion as it shall deem equitable, between such towns, their respective shares of the expenses of the construction, maintenance and repair of such bridge, and the amount to be received by each town, of the money raised by the county to be paid toward defraying the expenses of constructing and repairing such bridge.

§ 66. **County's share of expenses to be raised and paid to the commissioners of highways of the town.**— The board of supervisors shall cause to be raised and collected the amount to be paid by the county to any town toward the expenses of a bridge and when collected the same shall be paid to the commissioners of

highways of the town, to be applied by them toward the payment of such expenses.

§ 67. **May authorize a town to construct a bridge outside of a boundary line.**— The board of supervisors of any county may authorize any town, on a vote of a majority of the electors thereof voting at a regular town meeting, to appropriate a sum, or pledge its credit, to aid in, or wholly construct and maintain a bridge outside the boundaries of the town or county, or from or within the boundary line of any town into another town or county, but forming a continuation of highways leading from such town or county, and deemed necessary for the public convenience.

§ 68. **Bridges over county lines.**— The board shall provide for the care, maintenance, preservation and repair of any draw or other bridge intersecting the boundary line of counties or towns, and which bridge is by law a joint charge on such counties or towns, or on the towns in which it is situated; and to severally apportion, as it may deem equitable, the expense thereof on the towns respectively liable therefor, or on the respective counties when liable; but when such bridge shall span any portion of the navigable tide-waters of this state, forming, at the point of crossing, the boundary line between two counties, such expense shall be a joint and equal charge upon the two counties in which the bridge is situated, and the board of supervisors in each of such counties shall apportion such expense among the several towns and cities in their respective counties, or upon any or either of such towns and cities, as in their judgment may seem proper; and if there be in either of said counties, a city, the boundaries of which are the same as the boundaries of the county, then it shall be the duty of the common council of such city, to perform the duty hereby imposed upon the boards of supervisors; but no town or city not immediately adjacent to such waters, at the points spanned by said bridge, shall be liable for a larger proportion of such expense than the taxable property of such town or city bears to the whole amount of taxable property of such county. The board of supervisors of such counties or in any city embracing the entire county, and having no board of supervisors, the com-

mon council shall have full control of such bridges. No such bridge shall be constructed unless the board of supervisors in each of such counties, and the common council of the city whose boundaries are the same as the boundary of the other county adjacent to such waters, shall first by resolution determine that such bridge is necessary for public convenience, in which case such common council, with the consent of the mayor, may authorize the issue of bonds for the purpose of constructing such bridge, to be issued as other bonds are issued in said city. Whenever any bridge now spanning any such navigable tide-waters or hereafter erected across any such navigable tide-waters shall be condemned by the United States authorities as an obstruction to navigation, and shall be ordered removed, the county and city authorities having charge of such bridge, if they shall determine that such bridge shall be rebuilt, shall, as soon as practicable after such determination, cause plans to be prepared for the erection of the new bridge and the removal of any bridge so condemned as aforesaid, and within a reasonable time after the approval of any such plan by the United States authorities, the proper officers shall proceed with the construction of said new bridge. In case of any unreasonable delay on the part of the officer or officers charged with the duty of construction of such new bridge, such duty may be enforced by mandamus upon the application of any citizen interested in its performance.

Amd. L. 1896, ch. 995.

§ 69. **Authorizing towns to borrow money.**— The board may, upon the application of any town liable or to be made liable to taxation, in whole or in part, for constructing, building, repairing or discontinuing any highway or bridge therein or upon its borders, pursuant to a vote of a majority of the electors of any such town, at an annual town meeting, or special town meeting, called for that purpose, or upon the written request of the commissioners of highways and town board of such town, or towns, authorize such town or towns to construct, build, repair, or discontinue such highway or bridge, and if such town is within a county adjoining a city of the first class, authorize said town to build, construct

and repair a public dock or bulkhead within its boundaries and to borrow such sums of money for, and on the credit of such town or towns, as may be necessary for said purposes, to lay out, widen, grade, discontinue or macadamize such highway, or to purchase for public use, any plankroad, turnpike, tollroad or tollbridge in such town or towns, and may authorize the company owning the same, to sell the same or any part thereof, or the franchise thereof, or to pay any debt incurred in good faith, by or in behalf of such town or towns for such purposes. If such highway or bridge shall be situated in two or more towns in the same county, the board shall apportion the expenses among such towns in such proportion as shall be just.

Amd. L. 1894, ch. 163; L. 1896, ch. 178; L. 1900, ch. 12.

§ 70. **The raising and expenditure of moneys.**— The board shall, from time to time, impose upon the taxable property of such towns sufficient tax to pay such obligations as they shall become due. The supervisor and town clerk shall each keep a record, showing the date and amount of the obligations issued, the time and place of their payment, and the rate of interest thereon. The obligations shall be delivered to the supervisor of the town, who shall dispose of the same for not less than par, and pay the proceeds thereof to the commissioners of highways of the town, or to such other officer as shall be designated by the board of supervisors, to be used by them for the purposes for which the same were appropriated; but not more than five hundred dollars of such proceeds shall be expended upon any highway or bridge, except in pursuance of a contract made by a contractor with the commissioners of highways of the town, or other officer designated by the board of supervisors, and approved by the town board, no member of which shall be interested therein. If such highway or bridge shall be wholly or partly within the limits of an incorporated village, the consent of a majority of the trustees of such village shall be necessary for the action of the board of supervisors as herein provided.

§ 71. **Streets outside of city limits.**— When any territory in a county containing an incorporated city of one hundred thousand inhabitants, excepting the towns of Flatbush and New Lots in the county of Kings, has been mapped into streets and avenues, pursuant to law, the board of supervisors may authorize the establishment of a plan for the grade of such streets and avenues, laying out, opening, grading, constructing, closing and change of line of any one or more of them, and provide for the assessment on property intended to be benefited thereby, and fixing assessment districts therefor, and of the levy, collection and payment of the amount of damages sustained and the charges and expenses incurred, or which may be necessary to incur in carrying out such provisions, but such last named power in regard to laying out, opening, grading, constructing and change of line, of such streets or avenues or defraying the expenses thereof, shall only be exercised on the petition of the property owners, who own more than one-half of the frontage on any such street or avenue, or on a certificate of the town board and commissioners of highways of the town, that the same is, in their judgment, proper and necessary for the public interest. If the streets and avenues, in respect to which such action is proposed to be taken, shall lie in two or more towns, a like certificate shall be required of the town board and commissioners of highways of each town. Before making such certificate, such town board, or boards and commissioners of highways, shall give ten days' notice by publication in one of the daily papers of the county, and by conspicuously posting in six public places in each of such towns, of the time and place at which they will meet to consider the same, at which meeting the public, and all persons interested, may appear and be heard in relation thereto. No such street or avenue shall be laid out, opened or constructed, upon or across any lands acquired by the right of eminent domain, and held in fee for depot purposes by any railroad corporation, or upon or across any lands now held by a corporation formed for the purpose of improving the breed of horses, without the consent of such corporations. No town officer shall charge anything for his services under this section, nor shall any charge

be made against any such town or the property therein, for the expense of the publication of the notice herein required.

§ 72. **Survey and records of highways.**— The board may authorize and direct the commissioners of highways of any town, to cause a survey to be made, at the expense of the town, or* any or all of the highways therein, and to make or complete a systematic record thereof, or to revise, collate and rearrange existing records of highways, and correct and verify the same by new surveys and to establish the location of highways by suitable monuments. Such records so made, or revised, corrected and verified shall be deposited with the town clerk of the town, and shall thereafter be the lawful records of the highways which they describe; but shall not affect rights pending in any judicial proceeding commenced before the deposit of such revised records with the town clerk.

§ 73. **Regulation of toll rates.**— Such boards shall have power, by a vote of two-thirds of all the members elected to authorize an alteration, reduction or change of the rates of toll charged or received by any turnpike, plank or gravel road, or other toll road within such county, or by any bridge company or ferry within such county, or, if within more than one county, then by joint action with the supervisors of such counties, provided such alteration shall be asked for by the directors, trustees or owners of such road, bridge or ferry; but that no increase of toll shall be so authorized unless notice of intention to apply for such increase shall have been published in each of the newspapers published in such county, once in each week for six successive weeks next before the annual election of supervisors in such county; and any alteration in rates of toll authorized by any board of supervisors may be changed or modified by any subsequent board, on their own motion, by a like vote of two-thirds of all the members elected to such board; but nothing herein contained shall affect or abridge the powers of any city.

* So in the original

§ 74. **Highways in counties of more than 300,000 acres of unimproved land.**— The board may establish separate highway districts in counties containing more than three hundred thousand acres of unimproved unoccupied forest lands, for the purpose of constructing highways through such lands; such highway districts to be established upon the application of the owners of more than one-half of the non-resident lands therein. Any such highway district shall consist of contiguous tracts or parcels of land, and may include parts of one of* more towns; and they may be changed, altered or abolished at any time by the board. Such board may appoint one or more commissioners to lay out and construct such highways in any such district, and prescribe the powers and duties, and direct the manner in which highway taxes shall be assessed, levied and collected upon the lands within the district, and the manner of expenditure thereof.

They may also authorize such commissioners to borrow money on such terms as they may deem just, but not exceeding the amount of ten years' highway taxes upon such lands; and may, for the purpose of repaying such loan, set apart and appropriate the highway taxes upon such lands, for a period not exceeding ten years from the time of making such loan.

§ 75. **Appropriation of certain non-resident highway taxes.**— The board may, upon the application of the owners representing a majority in value, as shall be ascertained from the last annual assessment-roll of the real estate lying along the line of any highway, laid out through unimproved lands, in the cases not provided for in the last preceding section authorize the appropriation of the non-resident highway tax on the lands lying along such line, for the improvement of such highways.

§ 76. **Balance of state appropriations.**— The board may direct the expenditure of any non-resident highway or bridge tax, set apart by an act of the legislature, in counties wherein such non-resident lands are situated, when the official life of commissioners appointed to receive and expend such taxes has expired.

* So in the original.

§ 77. **Alteration of state roads.**— The board may authorize the commissioners of highways of any town in their county to alter or discontinue any road or highway therein, which shall have been laid out by the state under the same conditions that would govern their actions in relation to highways that have been laid out by local authorities.

§ 78. **Further powers.**— The board may make such other local and private laws and regulations concerning highways, alleys, bridges and ferries within the county, and the assessment and apportionment of highway labor or taxes therefor, not inconsistent with law, as it may deem necessary and proper, when the purposes of such laws and regulations can not be accomplished under the foregoing provisions, or general laws of the state.

§ 79. **Powers as to tires on vehicles.**— The board of supervisors may enact local and private laws regulating the width of tires used on vehicles built to carry a weight of fifteen hundred pounds or upwards, and may provide penalties for the violation thereof.

Added, L. 1894, ch. 644; amd. L. 1899, ch. 155.

§ 80. [**Use of abandoned turnpikes, etc.**]— Boards of supervisors shall have power to provide for the use of abandoned turnpike, plank or macadamized roads within any town as public highways; but jurisdiction in such a case shall not be exercised without the assent of two-thirds of all the members elected to such board, to be determined by yeas and nays, which shall be entered on its minutes.

Added, L. 1895, ch. 756.

§ 81. **Definition of words used in this article.**— Wherever the words "upon its borders," are used in this article in reference to the boundary line between two towns, the same is and was intended and shall be construed to mean "upon," "along," and "across its borders."

Added, L. 1900, ch. 163, in effect March 19, 1900.

THE TOWN LAW.

§ 12. **Election of officers.**— There shall be elected at the biennial town meeting in each town, by ballot, * * * one or three commissioners of highways. * * * At town meetings in town held at the same time as general elections, the names of all candidates for town offices shall be voted for in the same manner and on the same ballot as candidates for other offices voted for thereat. At such town meetings no person shall be allowed to vote for candidates for town offices who is not registered and entitled to vote at such general election.

Amd. L. 1893, ch. 344; L. 1897, ch. 481; L. 1898, ch. 363; L. 1901, chs. 349, 536, § 3.

See L. 1897, ch. 481, page , *post.*, for additional provisions as to election of town officers; also People ex rel. Lovett v. Randall, 151 N. Y., 497.

§ 13. **Term of office.**— * * * commissioners of highways, * * * when elected, shall hold their respective offices for two years. But whenever there is or shall be a change in the time of holding town meetings in any town, persons elected to such offices at the next biennial town meeting after such change shall take effect, shall enter upon the discharge of their duties at the expiration of the term of their predecessors, and serve until the next biennial town meeting thereafter or until their successors are elected and have qualified. Whenever the time for holding town meetings in any town is changed to the first Tuesday after the first Monday in November, except when changed as provided in section forty-three of this chapter, the town officers elected thereat shall take office on the first day of January succeeding their election. * * * All town officers hereafter elected at a biennial town meeting held at any time between the first day of February and the first day of May shall, in case a board of supervisors thereafter adopts a resolution changing the time of holding such biennial town meetings to the first Tuesday after the first Monday in November, hold office until the first day of January succeeding the biennial town meeting first held pursuant to such a resolution.

Amd. L. 1893, ch. 344; L. 1897, ch. 481; L. 1898, ch. 363; L. 1901, ch. 391, § 2.

§ 15. **Commissioners of highways.**— The electors of each town may, at their biennial town meetings, determine by ballot whether there shall be elected in their town one or three commissioners of highways. Whenever any town shall have determined upon having three commissioners of highways and shall desire to have but one, the electors thereof may do so by a vote by ballot taken at a biennial town meeting, and when such proposition shall have been adopted no other commissioner shall be elected or appointed until the term or terms of those in office at the time of adopting the proposition shall expire or become vacant and they may act until their terms shall severally expire or become vacant as fully as if three continued in office. When there shall be but one commissioner of highways in any town, he shall possess all the powers and discharge all the duties of commissioners of highways as prescribed by law. In towns of less than two square miles in area, where five-sixths of the territory shall consist of an incorporated village or villages, the office of highway commissioner is hereby abolished and the powers and duties heretofore performed by him shall devolve upon the town board of such town together with such further power and authority over highways, streets and bridges as are now possessed by or that may be hereafter granted to boards of trustees of villages of the third class. The provisions of this act shall not affect or abridge the term of office of any highway commissioner elected prior to the passage of this act.

Amd. L. 1895, ch. 239; L. 1897, ch. 481; L. 1901, ch. 583. In effect April 27, 1901.

§ 21. **Fence viewers.**— The assessors and commissioners of highways elected in every town shall, by virtue of their offices, be fence viewers of their town.

Renumbered L. 1897, ch. 481.

§ 22. **Powers of biennial town meetings.**— The electors of each town may, at their biennial town meeting:

* * * * * * *

5. Make provisions and allow rewards for the destruction of noxious weeds and animals, as they may deem necessary, and raise money therefor.

Amd. L. 1897, ch. 481.

§ 23. **Special town meetings.**— Special town meetings shall also be held whenever twenty-five taxpayers upon the last town assessment-roll shall, by written application addressed to the town clerk require a special town meeting to be called, for the purpose of raising money for the support of the poor; or to vote upon the question of raising and appropriating money for the construction and maintenance of any bridges which the town may be authorized by law to erect or maintain; * * *

Amd. L. 1894, ch. 280.

§ 36. **Balloting; electors in incorporated village when not to vote on highway questions.**— When the electors vote by ballot, except in town where the biennial town meetings are held at the time of general elections, all the officers voted for shall be named in one ballot, which shall contain written or printed, or partly written or partly printed, the names of the persons voted for, and the offices to which such persons are intending to be elected, and shall be delivered to the presiding officers so folded as to conceal the contents, and shall be deposited by such officers in a box to be constructed, kept and disposed of, as near as may be, in the manner prescribed in the general election law. When any town shall have within its limits an incorporated village, constituting a separate road district, exempt from the supervison and control of the commissioners of highways of the town, and from payment of any tax for the salary or fees of said commissioners, and from payment of any tax for the opening, erection, maintenance and repair of any highway or bridge of said town, without the limits of said village, no residents of such village shall vote at any biennial or special election in such town for any commissioner of highways for said town, nor for or against any appropriation for the opening, laying out, maintenance, erection or repair of any highway or bridge in said town, without the limits of said village. At the biennial elections in such towns, the names of candidates for the office of highway commissioner shall be printed on a different ballot from the one containing the names of candidates for other town offices. Such ballots shall be indorsed "commissioner of highways," and shall be deposited, when voted, in a separate ballot box, which also shall be

marked "commissioner of highways." Such ballots and ballot box shall be furnished by the officers now charged by law with that duty at town elections. A poll list shall be kept by the clerk of the meeting on which shall be entered the name of each person voting by ballot.

Amd. L. 1895, ch. 262; L. 1897, ch. 481; L. 1898, ch. 362.

§ 51. **Oath of office.**— Every person elected or appointed to any town office, except justice of the peace, shall before he enters on the duties of his office, and within ten days after he shall be notified of his election or appointment, take and subscribe before some officer authorized by law to administer oaths in his county, the constitutional oath of office, and such other oath as may be required by law, which shall be administered and certified by the officer taking the same without reward, and shall within eight days be filed in the office of the town clerk, which shall be deemed an acceptance of the office; and a neglect or omission to take and file such oath, or a neglect to execute and file, within the time required by law, any official bond or undertaking, shall be deemed a refusal to serve, and the office may be filled as in case of vacancy.

§ 55. **Refusal to serve as overseer of highways or pound-master.**— If any person chosen or appointed to the office of overseer of highways or pound-master shall refuse to serve, he shall forfeit to the town the sum of ten dollars.

§ 56. **Town officers to administer oaths.**— Any town officer may administer any necessary oath in any matter or proceeding lawfully before him, or to any paper to be filed with him as such officer.

§ 63. **Undertaking of commissioner of highways.**— Every commissioner of highways shall, within ten days after notice of his election or appointment, execute an undertaking with two or more sureties, to be approved by the supervisor of his town, to the effect that he will faithfully discharge his duties as such commissioner, and within ten days after the expiration of his term of office, pay over to his successor all moneys remaining in his hands as such

commissioner, and render to such successor a true account of all moneys received and paid out by him as such commissioner, which undertaking shall be delivered to the supervisor, and filed by him in the office of the town clerk within ten days thereafter.

§ 64. **Resignation of town officers.**— Any three justices of the peace of a town may, for sufficient cause shown to them accept the resignation of any town officer of their town; and whenever they shall accept any such resignation, they shall forthwith give notice thereof to the town clerk of the town.

§ 65. **Filling of vacancies.**— When a vacancy shall occur or exist in any town office, the town board or a majority of them, by an instrument under their hands and seals, appoint a suitable person to fill the vacancy, and the person appointed, except justices of the peace, shall hold the office until the next biennial town meeting. * * * The board making the appoinment shall cause the same to be forthwith filed in the office of the town clerk, who shall forthwith give notice to the person appointed. * * *

§ 66. **Form of undertaking, and liability thereon.**— Every undertaking of a town officer, as provided by this chapter or otherwise must be executed by such officer and his sureties and acknowledged or proven and certified in like manner as deeds to be recorded, and the approval indorsed thereon. The parties executing such undertaking shall be jointly and severally liable, regardless of its form in that respect, for the damages to any person or party by reason of a breach of its terms.

§ 80. **General duties of supervisor.**— The supervisor of each town shall:

1. Receive and pay over all moneys raised therein for defraying town charges, except those raised for the support of highways and bridges, and of the poor.

* * * * * * *

§ 82. **Fires in woods.**— Whenever the woods in any town shall be on fire, it shall be the duty of the justices of the peace, the supervisor and commissioners of highways of such town, and of

each of them, to order such and so many of the inhabitants of such town liable to work on the highways, and residing in the vicinity of the fire, as they shall severally deem necessary, to repair to the place where such fire shall prevail, and there to assist in extinguishing the same, or in stopping its progress.

§ 84. **Delivery of books and papers by outgoing officer to successor.**— Whenever the term of office of any supervisor, town clerk, commissioner of highways or overseer of the poor shall expire, or when either of such officers shall resign, and another person shall be elected or appointed to the office, the succeeding officer shall, immediately after he shall have entered on the duties of his office, demand of his predecessor all the records, books and papers under his control belonging to such office. Every person so going out of office, whenever so required, shall deliver upon oath to his successor all the records, books and papers in his possession or under his control belonging to the office held by him, which oath may be administered by the officer to whom such delivery shall be made, and shall, at the same time pay over to his successor the moneys belonging to the town remaining in his hands. If any such officers shall have died, the successors or successor of such officer shall make such demand of the executors or administrators of such deceased officer, and such executors or administrators shall deliver, upon the like oath, all records, books and papers in their possession, or under their control, belonging to the office held by their testator or intestate. If any person so going out of office, or his executors or administrators, shall refuse or neglect, when lawfully required, to deliver such records, books or papers, he shall forfeit to the town, for every such refusal or neglect, the sum of two hundred and fifty dollars; and officers entitled to demand such records, books and papers may compel the delivery thereof in the manner prescribed by law.

§ 161. **Meeting of town board for receiving accounts of town officers.**— At the meeting of the town board held on the Tuesday preceding the biennial town meeting and on the corresponding date in each alternate year, or on the third Tuesday of December in each year, all town officers who receive or disburse any moneys of the

town, shall account with the board for all such moneys received and disbursed by them by virtue of their office, and produce all receipts, orders and vouchers which they may have respecting the same, but no member of the board shall sit as a member of the board when any account in which he is interested is being audited by the board. The board shall make a statement of such accounts, and append thereto a certificate signed by at least a majority of them, showing the state of the accounts of each officer at the date of the certificate, which statement, certificate, receipts, orders and vouchers shall each be filed with the town clerk of the town, within three days thereafter, and be open to public inspection during the office hours of such town clerk.

Amd. L. 1897, ch. 481; L. 1898, ch. 363; L. 1902, ch. 259. In effect March 27, 1902.

§ 178. **Compensation of town officers.**— Town officers shall be entitled to compensation at the following rates for each day actually and necessarily devoted by them to the service of the town in the duties of their respective offices, when no fee is allowed by law for the service, as follows:

1. * * * commissioners of highways, * * * each, two dollars per day, * * * except that in the county of Nassau assessors and commissioners of highways shall be entitled to three dollars per day, and the town boards of the towns of and in said county of Nassau, having a population, as appears by the last federal census, of seventeen thousand inhabitants, or more, are hereby authorized and empowered to fix an annual compensation for the assessors and commissioners of highways of said towns, not to exceed twelve hundred dollars per annum each, and to provide for the payment of said compensation, in quarterly installments.

* * * * * * *

Amd. L. 1897, ch. 252; L. 1900, ch. 292; L. 1902, ch. 320. In effect April 2, 1902.

§ 184. [**Borrowing of amount of special appropriations.**]— Whenever a town meeting shall vote a special appropriation of money in the sum of five hundred dollars or more, or an

appropriation for highway purposes or for the support of the poor during the current year, to be levied upon the taxable property of the town, the town board shall have power to borrow the sum so appropriated upon the faith and credit of the town, and to issue therefor a certificate or certificates of indebtedness, bearing interest and payable at such date or dates as may be fixed by said board, and the proceeds of such loan shall be placed to the credit of the public officers charged by law with the expenditure of said moneys. A statement of the amount maturing on such certificate of indebtedness shall be certified by the town board at its second meeting and delivered to the supervisor of the town, to be by him presented to the board of supervisors of his county at its annual meeting, and the said board of supervisors shall cause the amount specified in such certified statement to be levied and raised upon the taxable property of the town in the same manner as they are directed to levy and raise other town charges.

Added by L. 1897, ch. 84. A *second* § 184 was added, L. 1898, ch. 538, but it is not material here

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LAWS 1897, CHAPTER 481, § 21.

(Part of an act to amend the Town Law.)

§ 21. There shall be elected at the town meeting in each town, in the spring of eighteen hundred and ninety-eight, one supervisor, one town clerk, one highway commissioner, one assessor, one collector, one or two overseers of the poor, not more than five constables and two inspectors of election for each election district, all of whom shall hold office for a term of one year. At the town meeting to be held in the spring of eighteen hundred and ninety-nine, all of such officers shall be elected in the manner and for the terms prescribed in this act. There shall be elected at the town meeting to be held in the spring of eighteen hundred and ninety-eight, one justice of the peace for a term of four years, beginning on the first day of January, eighteen hundred and ninety-nine. At the town meeting to be held in the spring of eighteen hundred and ninety-nine, there shall be elected two justices of the peace

for a term of four years, beginning on the first day of January, nineteen hundred; and at the biennial town meetings thereafter held there shall be elected two justices of the peace for a like term, beginning on the succeeding first day of January. At the town meeting to be held in the spring of eighteen hundred and ninety-nine, there shall be elected three assessors, two for a full term of two years and one for a term of one year, beginning at the expiration of the term of office of the assessor, whose term will expire in the spring of nineteen hundred. At every biennial town meeting thereafter held, three assessors shall be elected for a term of two years. If in any town there are three commissioners of highways, there shall be elected at the town meeting to be held in the spring of eighteen hundred and ninety-nine, three commissioners of highways, two for a term of two years and one for a term of one year, beginning at the expiration of the term of office of the commissioner whose term will expire in the spring of nineteen hundred. At every biennial town meeting thereafter held in any such town, three commissioners of highways shall be elected for a term of two years. The provisions of this act shall not affect or abridge the term of office of any town officer elected prior to the passage of this act.

In those towns where boards of town auditors have been established by law and are in existence at the time of holding of the annual town meeting in the spring of eighteen hundred and ninety-eight, the person elected to the office of town auditor, at the said annual town meeting in the spring of eighteen hundred and ninety-eight, whether so elected before or after the passage of this act shall hold office for the term of one year beginning at the expiration of the term of office of the auditor whose term of office will expire in the spring of eighteen hundred and ninety-eight. At the biennial town meeting held in the spring of eighteen hundred and ninety-nine, in those towns where board of town auditors have been so established there shall be elected three town auditors, two for a full term of two years and one for a term of one year beginning at the expiration of the term of office of the auditor whose term of office will expire in the spring of nineteen hundred. At every biennial town meeting thereafter held in those towns where boards of town

auditors have been established, as provided by law, three town auditors shall be elected, for a term of two years.

Amd. L. 1898, ch. 474.

LAWS 1835, CHAPTER 300.

AN ACT to enlarge the powers of commissioners of highways.

SECTION 1. Whenever any association or individual shall construct a railroad upon land purchased for that purpose, on a route which shall cross any road or other public highway, it shall be lawful for the commissioners of highways, having the supervision thereof, to give a written consent that such railroad may be constructed across, or on such road or other public highway; and thereafter such association or individual shall be authorized to construct and use such railroad across, or on such roads or other highways as the commissioners aforesaid shall have permitted; but any public highway thus intersected or crossed by a railroad, shall be so restored to its former state as not to have impaired its usefulness.

LAWS 1853, CHAPTER 62.

AN ACT to regulate the construction of roads and streets across railroad tracks.

SECTION 1. It shall be lawful for the authorities of any city, village or town in this state, who are by law empowered to lay out streets and highways, to lay out any street or highway across the track of any railroad now laid or which may hereafter be laid, without compensation to the corporation owning such railroad; but no such street or highway shall be actually opened for use until thirty days after notice of such laying out has been served personally upon the president, vice-president, treasurer or a director of such corporation.

§ 2. It shall be the duty of any railroad corporation, across whose track a street or highway shall be laid out as aforesaid, immediately after the service of said notice, to cause the said street or highway to be taken across their track, as shall be most convenient

and useful for public travel, and to cause all necessary embankments, excavation and other work to be done on their road for that purpose; and all the provisions of the act, passed April second, eighteen hundred and fifty, in relation to crossing streets and highways, already laid out, by railroads, and in relation to cattle,* guards and other securities and facilities for crossing such roads, shall apply to streets and highways hereafter laid out.

(The reference in this section to L. 1850, ch. 140, which is repealed, must now be deemed a reference to the Railroad Law.)

§ 3. If any railroad corporation shall neglect or refuse, for thirty days after the service of the notice aforesaid, to cause the necessary work to be done and completed, and improvements made on such streets or highways across their road, they shall forfeit and pay the sum of twenty dollars for every subsequent day's neglect or refusal, to be recovered by the officers laying out such street or highway, to be expended on the same; but the time for doing said work may be extended, not to exceed thirty days, by the county judge of the county in which such street or highway, or any part thereof, may be situated, if, in his opinion the said work cannot be performed within the time limited by this act.

LAWS 1898, CHAPTER 115.

AN ACT to provide for the improvement of the public highways.

SECTION 1. The board of supervisors in any county of the state may, and upon presentation of a petition as provided in section two hereof, must pass a resolution that public interest demands the improvement of any public highway or section thereof situate within such county, and described in such resolution, but such description shall not include any portion of a highway within the boundaries of any city or incorporated village, and within ten days after the passage of such a resolution shall transmit a certified copy thereof to the state engineer and surveyor.

* So in the original.

§ 2. The owners of a majority of the lineal feet fronting on any such public highway or section thereof in any county of the state may present to the board of supervisors of such county a petition setting forth that the petitioners are such owners and that they desire that such highway or section thereof be improved under the provisions of this act.

Form of petition, No. 118, *post.*

§ 3. Such state engineer upon receipt of such a resolution shall investigate and determine whether the highway or section thereof sought to be improved is of sufficient public importance to come within the purposes of this act, taking into account the use, location and value of such highway or section thereof for the purposes of common traffic and travel, and after such investigation shall certify his approval or disapproval of such resolution. If he shall disapprove such resolution, he shall certify his reasons therefor to such board of supervisors.

§ 4. If he shall approve such resolution, such state engineer shall cause the highway or section thereof therein described to be mapped out both in outline and profile. He shall indicate how much of such highway or section thereof may be improved by deviation from the existing lines whenever it shall be deemed of advantage to obtain a shorter or more direct road without lessening its usefulness or wherever such deviation is of advantage by reason of lessened gradients. He shall also cause plans and specifications of such highway or section thereof to be thus improved to be made for telford, macadam or gravel roadway or other suitable construction, taking into consideration climate, soil and materials to be had in the vicinity thereof and the extent and nature of the traffic likely to be upon such highway, specifying in his judgment the kind of road a wise economy demands. The improved or permanent roadway of all highways so improved shall not be less than eight feet nor more than sixteen feet in width unless for special reasons to be stated by such state engineer it is required that it shall be of greater width. He shall if requested by the resolution include provision for steel plate or other flat rail construction in double track.

§ 5. Upon the completion of such maps, plans and specifications such state engineer shall cause an estimate to be made of the cost of construction of the same and transmit the same to the board of supervisors from which such resolution proceeded, together with a certified copy of such maps, plans and specifications, and of his certificate of the approval of the highway or section thereof so designated as aforesaid.

§ 6. After the receipt thereof upon a majority vote of such board of supervisors, it may adopt a resolution that such highway or section thereof so approved shall be constructed under the provisions of this act, or of any existing act, and thereupon shall transmit a certified copy of such resolution to such state engineer.

§ 7. In case the boundaries of such proposed highway shall deviate from the existing highway, the board of supervisors must make provision for securing the requisite right of way prior to the actual commencement of the work of improvement.

§ 8. Upon receipt of the certified copy of the resolution provided in section six, such state engineer shall advertise for bids for two successive weeks in a newspaper published at the county seat of such county, and in such other newspaper as shall be deemed of advantage for the construction of such highway or section thereof, according to such plans and specifications, and award such contract to the lowest responsible bidder, except that he may in his discretion award the contract to the board of supervisors of the county or the town board or boards of the town or towns in which such highway lies, and except that no contract shall be awarded at a greater sum than the estimate provided in section five. But if no bid otherwise acceptable be made within such estimate, such state engineer may amend his estimate, certify the same to the board of supervisors, and upon the adoption by it of a resolution as provided in section six based on such amended estimate, proceed anew to obtain bids and award the contract as herein provided. Such engineer may reject any or all bids, and before entering into any contract for such construction, he shall require a bond with sufficient sureties, conditioned that if the proposal shall be accepted the party thereto will perform the work upon the terms proposed

and within the time prescribed and in accordance with the plans and specifications; and as a bond of indemnity against any direct or indirect damages that shall be suffered or claimed during the construction of such road and until the same is accepted. The people of the state of New York shall in no case be liable for any damages suffered. Partial payments may be provided for in the contracts and paid in the manner herein provided when certified to by such state engineer to an amount not to exceed seventy-five per centum of the value of the work done; twenty-five per centum of the contract price shall be retained until the entire work has been accepted. Whenever a county engineer has been appointed in the county in which such highway or section thereof is to be constructed, he shall have general charge and supervision of the work under the direction of such state engineer and shall report to him from time to time the progress of the work and such facts in relation thereto as may be required. If there is no county engineer, such state engineer shall have some competent person to superintend and have engineering supervision of the work.

§ 9. One-half of the expense of the construction thereof shall be paid by the state treasurer upon the warrant of the comptroller, issued upon the requisition of such engineer, out of any specific appropriations made to carry out the provisions of this act. And one-half of the expense thereof shall be a county charge in the first instance, and the same shall be paid by the county treasurer of the county in which such highway or section thereof is, upon the requisition of such engineer, but the amount so paid shall be apportioned by the board of supervisors, so that if the same has been built upon a resolution of said board without petition, thirty-five per centum of the cost of construction shall be a general county charge; and fifteen per centum shall be a charge upon the town in which the improved highway or section thereof is located, and if the same has been built upon a resolution of said board after petition as provided in section two, thirty-five per centum shall be a general county charge and fifteen per centum shall be assessed upon and paid by the owners of the lands benefited in the proportion of the benefits accruing to said owners as determined by the town assessors in the next section hereof.

§ 10. The town assessors of any town in which any highway or section thereof has been improved or constructed pursuant to petition as provided in section two of this act, shall have power and it shall be their duty upon receiving notice from the board of supervisors of the county in which said town is located, of the cost of construction or improvement of such highway or section thereof in such town, to assess an amount equal to fifteen per centum of said total cost upon the lands fronting or abutting on such highway or section thereof. Such assessment shall be apportioned according to the benefits accruing to the owners of the land so located, according to the best judgment of said assessors, upon at least ten days' notice of the time and place of such apportionment to the persons affected thereby, and after such persons have had an opportunity to be heard; and the assessments so made when duly attested by the oaths of such assessors shall be collected in the same manner as the general taxes of such town are collected.

Amd. L. 1899, ch. 92, in effect March 16, 1899.

§ 11. The construction and improvement of highways and sections thereof, under the provisions of this act, shall be taken up and carried forward in the order in which they are finally designated, as determined by the date of the receipt in each case of the certified copy of the resolution provided in section six by such engineer as hereinbefore provided.

§ 12. **Acceptance upon completion of highways, etc.; apportionment of expense.**— Upon the completion of such highways, or sections thereof, so constructed by such engineer, and his acceptance of the same, and after payment has been made as herein provided, such engineer shall inform the board of supervisors of such county that the highways or sections thereof designated have been constructed as herein provided; and he may serve notice on said board to accept such highway thus constructed, which notice shall be filed in the office of the clerk of said county; and twenty days after the service and filing of said notice, such highway or section thereof shall be deemed accepted by said board of supervisors of such county; and thereafter they shall maintain the same

as a county road, and may apportion the expense thereof upon the town or towns which such board deems benefited thereby; and the commissioners of highways of the town or towns, respectively, wherein such improved highways lie shall care for and keep the same in repair, under the direction and supervision of the state engineer and surveyor and such rules and regulations as he may prescribe. If any board of supervisors or any commissioner of highways shall fail or neglect to properly perform such duties within such time as may be prescribed by such engineer for the performance thereof, such engineer may cause the same to be performed and the expense thereof to be paid by the state treasurer out of any funds in his possession not otherwise appropriated, upon whom such engineer shall make draft therefor, and the amount thereof shall be charged by the comptroller against the county in which such improved highway shall be located, and be included by the board of supervisors of such county in its next annual tax levy as a county charge, unless the same be apportioned as above provided, in which case it shall be included in the tax so levied upon the town or towns to which it shall be apportioned.

Amd. L. 1900, ch. 293; L. 1901, chs. 109, 464; L. 1902, ch. 53. In effect February 20, 1902.

§ 13. All persons owning property abutting on such road so improved, or residing thereon, shall thereafter pay all highway taxes assessed against them in money, in the mannar now provided by law.

§ 14. Whenever any county has had aid in building any such highway, and it seems advantageous to such state engineer that a section or sections of highway, not exceeding one mile in length, should be constructed under this act to connect these roads together, and would be of great public utility and general convenience, he may serve notice on the board of supervisors of such county, and shall file one in the county clerk's office, designating the highways already constructed and the existing terminal, and the section or sections, in his opinion, necessary to be constructed and his reasons therefor. And it shall be the duty of the board of supervisors to provide for the construction of such connecting highway or section

thereof, within one year after the service and filing of such notice under this act.

§ 15. In addition to his other powers and duties, the state engineer and surveyor shall compile statistics relative to the public highways throughout the state, and shall collect all information in regard thereto deemed expedient. He shall investigate and determine upon various methods of road construction adapted to different sections of the state, and as to the best methods of construction and maintenance of roads and bridges, and such other information relating thereto as he shall deem appropriate. He may be consulted at all reasonable time by county, city, town or village officers having care and authority over highways and bridges, and shall advise such officers relative to the construction, repair, alteration, or maintenance of the same; and shall furnish such other information and advice as may be requested by persons interested in the construction and maintenance of public highways, and shall, at all times, lend his aid in promoting highway improvement throughout the state. He shall hold in each year at least one public meeting in each county, and shall cause due notice of such meeting to be given. He shall co-operate with all highway officers and shall assist county and town authorities, and when requested by them, furnish them with plans and directions for the improvement of the public highways and bridges.

§ 16. He shall report annually to the legislature concerning all the work performed by him, together with such recommendations upon the subject of highway construction and maintenance as to him shall seem appropriate.

§ 17. The commissioners of highways and town board of any town, and the board of supervisors of any county, and all other officers who now have or may hereafter have by law the care and supervision of the public highways and bridges shall, from time to time, upon his written request furnish him with all available information in connection with the building and maintenance of the public highways and bridges in their respective localities.

§ 18. The operation of this act shall not be affected by any special act, but the highways may be improved under this act or such special act wherever the same may now exist.

§ 19. No street surface railroad shall be constructed upon a portion of a highway, which portion has been or may be hereafter improved under the provisions of this act and the acts amendatory thereof and supplemental thereto, except upon the consent of, and under such conditions and regulation as may be prescribed by the state engineer and surveyor.

Inserted L. 1902, ch. 379, § 1, in effect April 7, 1902. Former § 19 renumbered § 20, id., § 2.

§ 20. This act shall take effect immediately.

Formerly § 19; renumbered by L. 1902, ch. 379, § 2.

As to acquiring rights of way, etc., under this chapter, see L. 1901, ch. 240, below.

LAWS 1901, CHAPTER 240.

AN ACT supplementary to chapter one hundred and fifteen of the laws of eighteen hundred and ninety-eight, entitled "An act to provide for the improvement of public highways," relative to securing the requisite right of way by the board of supervisors of counties in which public highways are improved pursuant to said chapter.

In effect April 2, 1901.

SECTION 1. **Provisions for obtaining right of way.**— In any county of the state in which a public highway is improved pursuant to the provisions of chapter one hundred and fifteen of the laws of eighteen hundred and ninety-eight, entitled "An act to provide for the improvement of public highways" and the acts amendatory thereof, the boards of supervisors of said counties may make provisions for obtaining the right of way required as hereinafter provided.

§ 2. **Acquisition of lands by purchase.**— The board of supervisors of any county in which land is required to be taken for the

improvement of highways under chapter one hundred and fifteen of the laws of eighteen hundred and ninety-eight and the acts amendatory thereof, or supplemental thereto, where the boundaries of any proposed highway shall deviate from any existing highway, or where land is required for the purpose of obtaining gravel, stone, or other materials, for the construction or maintenance of such highways or required for spoil banks, may acquire such land, together with the right of way to any bed, pit, quarry, spoil bank or other place in which the same is located, by purchase, provided that the price paid for such land or right of way required shall not in any one case to any one claimant exceed two hundred dollars, except with the written approval of the county judge and county treasurer, in which case it shall not exceed one thousand dollars; and the said board of supervisors may, by resolution, passed for that purpose, authorize its chairman, or a member, or a committee therefrom to make purchases as provided in this section; and said board may pass resolutions providing for the payment of land purchased as provided for in this section, the same to be a county charge in the first instance and to be paid in the manner hereinafter specified for the payment of awards in cases where condemnation proceedings are required.

Amd. L. 1902, ch. 510, § 1; in effect April 10, 1902.

§ 3. **Petition for appointment of commissioners, etc.**— In case the board of supervisors may not be able to acquire the land by purchase as provided for in the last section the board of supervisors may present to the county court of the county or to the supreme court, at a special term thereof, to be held in the judicial department in which said county is located, a petition for the appointment of three commissioners of appraisal to ascertain and determine the compensation to be made to the owners and all other persons in any manner interested in any and all real estate over which such right of way is required. Such petition shall describe the land to be acquired, a reference to the map upon which the same is shown and shall have annexed thereto said map or diagram showing the land to be acquired. Such petition shall be signed in the name of the board of supervisors by the chairman thereof or

by any member thereof designated for that purpose by resolution, and shall be verified by the said chairman or by any member thereof designated by resolution as aforesaid. Notice of presentation of such petition to such court shall be given by the petitioner by publishing such notice in two newspapers published in such county, once in each week for two weeks successively preceding the day of such presentation, and also by posting a copy of said notice in not less than three public places in each town in which property to be acquired is located, at least eight days preceding the day of such presentation.

§ 4. **Appointment of commissioners, etc.**— Upon such presentation, such court shall, after hearing any person interested or claiming to be interested in any land to be acquired in such proceeding who may appear, appoint three disinterested persons as commissioners. And in case any of such commissioners shall at any time decline to serve, or die, or for any cause become disqualified or disabled from serving as such, the said court, at a similar special term, may upon similar notice, application and hearing, and upon such notice to the land owners as the court may prescribe, appoint another or other person, similarly qualified to fill the vacancy or vacancies and to act in their place and stead.

§ 5. **Duties of commissioners, etc.**— The said commissioners shall take the oath of office prescribed by the constitution of this state, which oath shall be filed in the office of the county clerk of such county. The commissioners shall with all reasonable diligence proceed to examine such highways and lands to be acquired and may enter upon such lands for such purpose. Said commissioners shall cause a notice to be published in two such newspapers as aforesaid, once each week for two weeks successively next preceding the day of meeting mentioned in such notice, that at a stated time and place within said county they will meet for the purpose of hearing any and all parties interested or claiming to be interested in the damages to be awarded for the lands to be taken for such highways: Said notice shall also state the fact that a map or maps showing the land to be acquired has been filed in the county clerk's office. At the time and place of said meeting and at any adjourn-

ment thereof which said commissioners may publicly make, they shall hear the proofs and allegations of any and all parties interested or claiming to be interested in the amount of said damages. Said commissioners may adjourn the proceedings before them from time to time, issue subpoenas or administer oaths in such proceedings; and they shall keep minutes of their proceedings, and shall reduce to writing all oral evidence given before them. The said commissioners shall thereafter make and sign a report in writing, in which they shall assess, allow and state the amount of damages to be sustained by the owners of the several lots, pieces or parcels of land to be taken for the purposes aforesaid. Such report shall contain the name or names of such owners, or owner of any parcel of land to be acquired as aforesaid except in case the commissioners are unable to ascertain the name or names of the owner or owners of any parcel of land to be acquired as aforesaid, they may in place of the names of such undiscovered parties insert the words, "unknown owners" in their report. The said commissioners shall file their said report, together with the minutes of their proceedings in the office of the county clerk of such county. After said report shall have been completed and filed as aforesaid, the commissioner shall after publishing a notice in like manner as that provided in the first section hereof for the publication of the notice therein provided for, apply to the county court of the county or to the supreme court, at a special term thereof to be held in the judicial department in which said county is located, to have the said report confirmed. If no sufficient reason to the contrary shall appear, the court shall confirm said report. Otherwise it may refer the same back to the said commissioners for revision or correction; and after such revision or correction the same proceedings shall be taken as are hereinbefore provided for, and the commissioners shall in the same manner make renewed application for the confirmation of such report, and the court shall thereupon confirm or refer back the said report and such proceedings shall be repeated until a report shall be presented which shall be confirmed by the said court.

§ 6. **Payment of awards, etc.**— Within six months after the report of said commissioners shall be confirmed as aforesaid, the county treasurer of such county shall pay to the several respective persons named in such report respectively the amounts awarded to them therein for damages as aforesaid with six per centum interest thereon from the day of the confirmation of said report which amounts with such interest and the amounts paid in pursuance of section two of this act are hereby made and declared to be a county charge in the first instance, and the same shall be paid by the county treasurer; in cases under section two of this act, upon requisition of the chairman of the board of supervisors of said county or by any member thereof or by a committee therefrom designated for that purpose by said board and in cases under section five of this act upon service of a certified copy of the order confirming the said awards. The amounts so paid and the cost of the proceedings to acquire the land shall be a general county charge. In case there are unknown owners, to whom the award is made in said report, the said county treasurer shall deposit the amounts awarded to them with like interest in some trust company or bank in such manner as the said court shall in the order of confirmation direct, such amounts to be paid out upon the application of said unknown owners when discovered. From the date of the confirmation of such report by the order of the said court the title to all the lands therein designated shall vest in said county for the purposes of a highway forever.

§ 7. **[Costs and compensation.]**—In all cases of assessment of damages by commissioners appointed by the court, the costs thereof shall be a county charge in the first instance and be paid by the county treasurer as hereinbefore provided, except when reassessment on damages shall be had on the application of the party for whom damages were assessed, and such damages shall not be increased on such reassessment, the costs shall be paid by the party applying for the reassessment and when application shall be made by two or more persons for reassessment of damages all persons who may be liable for costs under this section shall be liable in proportion to the amount of damages respectively assessed to them

by the first assessment, and may be recovered by action. Each commissioner appointed by the court as provided in this chapter for each full day necessarily employed as such, shall be entitled to the sum of six dollars and his necessary expenses. The amount of compensation to which such commissioners are entitled shall be determined by the court in which the proceeding is pending, upon verified accounts presented by such commissioners, stating in detail the number of hours, necessarily employed in the discharge of their duties, and the nature of the services rendered. The audit and determination of the court as to the amount justly due shall be final.

Amd. L. 1902, ch. 510, § 2; in effect April 10, 1902.

§ 8. This act* shall take effect immediately.

§ 8.† **[Disposition of lands when no longer needed.]**— Any lands acquired by purchase or condemnation, pursuant to the provisions of the act‡ hereby amended, for the purpose of obtaining gravel, stone, or other materials, for the construction or maintenance of highways improved or constructed as provided in said chapter one hundred and fifteen of the laws of eighteen hundred and ninety-eight, or required for spoil banks, may be sold or leased by the board of supervisors of any county, when no longer needed for any of such purposes. The proceeds thereof shall be paid into the county treasury and shall be retained therein as a separate fund available for the construction or maintenance of highways improved or constructed under such chapter one hundred and fifteen of the laws of eighteen hundred and ninety-eight.

Added L. 1902, ch. 510, § 3; in effect April 10, 1902.

* This has reference to the act of 1901, which went into effect April 2, 1901.

† So in the original.

‡ L. 1901, ch. 240.

LAWS 1891, CHAPTER 309.

AN ACT to authorize overseers of highways to acquire gravel for highway purposes.

SECTION 1. The overseers of highways of any road district of the state, with the consent of the commissioners of highways of the town, and the approval of the town board, shall have power to purchase of the owner of any gravel bed or pit within the town, gravel for the purpose of grading, repairing or otherwise improving the highways of the town at a price per cubic yard approved by said commissioners and town board. If such overseer cannot agree with any such owner for the purpose of such gravel, the overseer, with the consent of such commissioners and the approval of such town board, shall have power to acquire by condemnation the right to take and use such gravel, provided, no gravel shall be so condemned within one thousand feet of any house or barn, or taken from any lawn, orchard or vineyard, and to remove the same from such bed or pit for the purpose of grading, repairing or otherwise improving such highways, together with the right of way to and from such bed or pit to be used for the purpose of such removal. The right to use such gravel or to take the same from any such bed or pit may be acquired under this section for two or more or all of the road districts of the town, in common; and if acquired for two or more or all of the districts, the commissioners of highways, with the approval of the town board, must make the purchase or acquire such right by condemnation. The amount agreed to be paid upon any such purchase, and the amount adjudged to be paid upon any such condemnation shall be paid by the districts in which such gravel shall be used, but the costs and expenses of the proceedings for the condemnation incurred by the overseer, shall be a charge upon the town, and shall be audited by the town board, and paid the same as other town charges.

§ 2. If the town shall abandon for the period of three years any right so acquired to use any gravel bed or pit or to take gravel therefrom, or if the overseer of highways of any such district

wherein any such right shall have been so acquired, or the commissioners of highways of the town shall cease to use the same for the purposes for which it was acquired, the right of the town and of such overseer and commissioners thereto shall cease, and the ownership thereof shall revert to and become vested in the owner of such bed or pit at the time such right was acquired, or his heirs or assigns.

§ 3. This act shall take effect immediately.

LAWS 1895, CHAPTER 717.

AN ACT to compel highway commissioners to file their contracts in certain cases.

SECTION 1. Within twenty days after the passage of this act, it shall be the duty of the highway commissioners in each of the several towns of this state which has adopted the money system of taxation for highway purposes to file with the town clerk of the town in which said commissioners reside all contracts made by such commissioners by and on behalf of such towns for the construction, care and maintenance of the public highways located therein.

§ 2. All commissioners of highways in towns wherein the money system of taxation has been adopted for highway purposes shall, within ten days after any such contracts have been made as specified in section one of this act, file the said contracts with the town clerk of the town in which such highways are located.

§ 3. Any person offending against the provisions of this act is hereby declared to be guilty of a misdemeanor.

§ 4. This act shall take effect immediately.

LAWS 1890, CHAPTER 291.

AN ACT to authorize towns to raise additional money for highway purposes and to prevent snow blockade of highways by the substitution of wire for other fences along the same.

SECTION 1. It shall be lawful for the commissioner of highways of any town in this state to apply in open town meeting for a vote authorizing such sum, not to exceed three hundred dollars in any one year, to be raised, in addition to the sums now allowed by law, as they may deem necessary for the purpose specified in the third section of this act. The same notice shall be given by the commissioners of their intention to apply for the raising of such additional sum as is now required by law for the raising of money for roads and bridges, above the amount of two hundred and fifty dollars.

§ 2. If the town meeting shall, by their votes, determine that a sum shall be raised for the purpose specified in this act, the proceedings for certifying and levying, collecting and paying the same shall be in all respects the same as now provided by law for the raising and paying over of money for roads and bridges, above the amount of two hundred and fifty dollars.

§ 3. The commissioners of highways shall expend the money raised under the provisions of this act in the purchase of fence wire, in the same manner as other supplies for highway purposes are by law required to be purchased, and no part of such money shall be expended, except for the purchase of fence wire as aforesaid; and the said commissioners are hereby authorized to contract with the owners of the lands lying along the highways of their respective towns, at such points as are liable to snow blockade, for the removal of the fences now standing along the boundaries of such highways, and the replacing of such fences with wire fences. And they may contract to deliver to said land owners, fence wire to be used in the construction of such fences, without charge to said land owners, at the place of purchase, but they shall not agree to pay any part of the cost of the removal or construction

called for by said contracts, or to make any payment to said land owners as a compensation for the construction of fences.

§ 4. The fences to be built under the provisions of this act, shall be of four strands of wire with a substantial bar of wood at the top; and the construction of said fences, and the size of said top bars and of the posts and supports of said fences, and their distance apart shall be such as said commissioners shall prescribe. Whenever such fence or fences shall become so out of repair as to be dangerous to animals passing along the highways, it shall be the duty of the owner or owners of said fence or fences to immediately repair or remove the same.

§ 5. Whenever the commissioner of highways of any town shall contract for the removal of any fence, under the provisions of this act, they shall file in the office of the town clerk of said town, a description of that portion of the highway to which said contract shall apply, and thereafter, it shall not be lawful for any person to replace the fence so contracted to be removed, with any fence liable to cause the drifting of snow.

§ 6. This act shall take effect immediately.

LAWS 1870, CHAPTER 311.

AN ACT to provide for repairing and keeping in order highways, streets and roads between cities, towns and villages.

SECTION 1. Whenever a highway, street or road shall be on the line between a city, town or village, or between either of them, the officers authorized and required to repair and keep in order the highways, streets and roads in such city, town, and village, shall meet together at the mayor's office in such city, if said highway, street or road be on the line between a city and town or a city and village, or at the office of the town clerk of such town, if the same be on the line between a town and village, on the first Monday of May in each year, at 12 o'clock M. and divide such highway, street or road, and allot one part thereof to such city and the other to such town or village, or one part thereof to such town and the

other to such village, as the case may be, in such manner that the labor and expense of working and keeping in repair such highway, street or road may be equal as near as may be.

§ 2. Upon the neglect or failure to attend on the part of the officers of any city, town or village, at the time or places designated in the first section of this act for the purposes therein mentioned, the officers of the city, town or village present may perform the said duty, and when done, the divisions thus made shall be of the same force and effect as if made by the joint action of such city and town, or such city and village, or such town and village.

§ 3. The statement of the division made pursuant to the provisions of the first or second section of this act shall be reduced to writing and properly authenticated by the officers making the same, and shall be filed within ten days after such division is made in the offices of the city clerk of the city, of the town clerk of the town, and of the clerk of the village, between whom such division has been made.

§ 4. This act shall take effect immediately.

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FORMS.

No. 1.

Designation of Treasurer.

(§ 2, *ante.*)

We, the undersigned commissioners of highways of the town of ....., ... county, N. Y., the same being a town in which there is more than one commissioner of highways, do, pursuant to the provisions of section 2 of the Highway Law, hereby designate ....., one of our number, to be treasurer.

Witness our hands at said town this ..... day of ....., 190...

.....

.....

.....

Commissioners of Highways.

No. 2.

Undertaking of Treasurer.

(§ 2, *ante;* Town Law, § 66; Pub. Off. L., § 11.)

WHEREAS, The commissioners of highways of the town of ....., ... county, N. Y., did, on the ..... day of ....., 190.., designate the undersigned, ..., to be treasurer pursuant to section 2 of the Highway Law; (*or,* WHEREAS, The commissioners of highways of the town of ....., ... county, N. Y., have failed to designate one of their number to be treasurer; and, WHEREAS, The undersigned is of said commissioners the longest in office and has therefore become treasurer pursuant to section 2 of the Highway Law);

NOW, THEREFORE, The said ....., as principal, and ..... and ....., both of the said town of ....., as sureties, do hereby jointly and severally undertake to and with the said town of ..... that the said ..... will faithfully discharge the duties of his office and promptly and faithfully account for and pay over to any officer or person entitled thereto and in accordance with law any and all moneys or property that may come into his hands or be received by him as such officer, otherwise, we will pay all damage, costs and expenses resulting from such default.

Witness our hands and seals this ..... day of ....., 190...

..... [L. S.]
..... [L. S.]
..... [L. S.]

No. 3.

Certificate of Acknowledgment for Undertaking.

STATE OF NEW YORK,
COUNTY OF ..... } *ss.:*
TOWN OF .....

On this ..... day of ....., 190.., before me, the subscriber, personally appeared .....
.... and ....., to me personally known to be the same persons described in and who executed the foregoing instrument, and they severally duly acknowledged to me that they executed the same.

.....
Notary Public [or as may be].

No. 4.

Justification of Sureties upon Undertaking.

(§ 2, *ante*, and Pub. Off. L., § 11.)

STATE OF NEW YORK,
COUNTY OF .....
TOWN OF ..... } *ss.:*

..... and ....., being severally duly sworn, depose and say:

The said ..... that he is by occupation a ....., and is a freeholder (*or* householder) within the State and resides in the town of ....., in said county of ..... and State of New York, and is worth ..... dollars ($) (*insert any amount sufficient to satisfy supervisor of surety's responsibility*), over and above his just debts and liabilities and property exempt from execution.

And the said ..... that he is by occupation a ....., and is a freeholder (*or* householder) within the State and resides in the town of ....., in said county of ..... and State of New York, and is worth ..... dollars ($) (*insert any amount sufficient to satisfy supervisor of surety's responsibility*), over and above his just debts and liabilities and property exempt from execution.

.....
.....

Severally subscribed and sworn to before me
this ..... day of ....., 190...

.....
Notary Public [or as may be].

No. 5.

Supervisor's Approval of Undertaking.

(§ 2, *ante*.)

I hereby approve the foregoing undertaking, both as to form and sufficiency of sureties.

Dated ....., 190...

.....,
Supervisor of the Town of .....

No. 6.

Resignation of Highway Commissioner.
(Pub. Off. L., § 21, subd. 6.)

To ....., *Esq., Town Clerk of* ....., ... *County, N. Y.:*

I hereby tender my resignation of the office of commissioner of highways in said town of ..... for the following reasons: .....

Dated ....., 190..

[*Signature.*]

(*For provisions as to acceptance of resignation, filling vacancy, etc., see Town Law,* §§ 64, 65, ante; 1 *R. S.,* 348; § 34; *L.* 1890, *ch.* 252.)

No. 7.

Appointment of Commissioner of Highways to fill Vacancy.
(Town Law, § 65.)

WHEREAS, A vacancy has occurred in the office of commissioner of highways in the town of ....., ... county, N. Y., by reason of the (*e. g.*, resignation) of .....

NOW, THEREFORE, We the undersigned (*majority of the*) town board of said town, at a meeting thereof, duly called and held for that purpose, do hereby, pursuant to section 65 of the Town Law, appoint ....., of said town, to fill the vacancy in said office, he to hold office until the next biennial town meeting.

Witness our hands at said town this .... day of ....., 190...

....., *Supervisor,*
....., *Town Clerk,*
....., *Justice of the Peace,*
....., *Justice of the Peace,*
Constituting said Town Board.

No. 8.

Oath of Office of Commissioner of Highways.

(Town Law, § 51, *ante;* Const., Art. 13, § 1, *ante;* Pub. Off. L., § 10.)

I do solemnly swear (*or* affirm) that I will support the Constitution of the United States, and the Constitution of the State of New York, and that I will faithfully discharge the office of commissioner of highways of the town of ....., ... county, N. Y., according to the best of my ability;* and I do further solemnly swear (*or* affirm) that I have not, directly or indirectly, paid, offered or promised to pay, contributed, or offered or promised to contribute any money or other valuable thing as a consideration or reward for the giving or withholding a vote at the election at which I was elected to said office, and have not made any promise to influence the giving or withholding any such vote.*

.....

Subscribed and sworn to before me
this .... day of ....., 190..

.....
Notary Public.

(*This oath may be taken before any one authorized to take acknowledgments of deeds or before town clerk. Town L.,* § 56, ante; *Pub. Off. L.,* § 10.)

No. 9.

Undertaking of Commissioner of Highways.

(Town L., §§ 63, 66; Pub. Off. L., § 11.)

WHEREAS, ..., of the town of ....., in the county of ....., N. Y., was, on the .... day of ....., 190.., duly elected (*or* appointed) commissioner of highways of said town;

Now, THEREFORE, We, the said ....., as principal, and ..... and ....., both of the town of ....., as sureties, do hereby jointly and severally undertake to and with the said town that the said ..... will faithfully discharge his duties as such commissioner, and that he will, within ten days after the expira-

tion of his term of office, pay over to his successor all moneys or property remaining in his hands as such commissioner, and render to such successor a true account of all moneys or property received or paid out by him as such commissioner.

Witness our hands and seals this ..... day of ....., 190..

..... [L. S.]
..... [L. S.]
..... [L. S.]

(*For form of acknowledgment, justification of sureties and approval of supervisor, see forms Nos.* 3, 4 *and* 5, ante.)

No. 10.

List of Unperformed Labor.

(§ 4, subd. 1, *ante.*)

To ....., *Esq., Supervisor of the Town of* ....., ... *County, N. Y.:*

It appearing to me, the undersigned commissioner of highways of the said town of ....., upon examination made pursuant to the provisions of subdivision 1 of section 4 of the Highway Law, that the labor assessed in highway district No. .... of said town has not been entirely performed therein, I transmit pursuant to said subdivision this statement containing the number of days' labor which have not been performed in such district, and a list of all persons and corporations owning property therein, and the number of days' labor still to be performed by such persons and corporations.

Names.	No. of days' labor still to be performed
.....	.....
.....	.....
.....	.....
Total days' labor not performed,	.....

Dated ....., 190..

.....
Commissioner of Highways.

No. 11.

Notice of Transmission of, and Hearing upon Such List.
(§ 4, subd. 1, *ante.*)

To All to Whom It May Concern:

YOU WILL PLEASE TAKE NOTICE that the undersigned commissioner of highways of the town of ....., ... county, N. Y., has, pursuant to subdivision 1 of section 4 of the Highway Law, transmitted to ....., Esq., supervisor of said town, a statement containing the number of days' labor which have not been performed in Highway District No. .... of said town, and a list of all persons and corporations owning property in said district, and the number of days' labor still to be performed by such persons and corporations.

You will further take notice that on the .... day of ....., 190.., at ....., in the .....noon, at the ..... (*e. g.,* residence of said supervisor), in said town, the persons assessed for highway labor in said district may be heard before such supervisor, and that at that time such further proceedings may be had as are by said statute provided.

Dated ..... day of ....., 190..

.....
Commissioner of Highways.

(*As to posting this notice and as to the duties of the supervisor in such cases, see Highway Law,* § 4, *subd.* 1, ante.)

No. 12.

Order Ascertaining and Describing a Highway by Use.
(§ 4, subd. 2, and § 100, *ante.*)

At a meeting of the commissioners of highways of the town of ....., ... county, N. Y., duly called and held on the ..... day of ....., 190.., for the purpose of ascertaining and describing the following highway by use,

ORDERED, That the highway in said town known as the ..... (*e. g.,* "Hill Road"), and which highway has been used as such for twenty years, but not recorded (*or,* has been laid

out but not sufficiently described), be and the same hereby is ascertained and described as follows: (*Here describe the highway, taking particular care to give so definite a survey that it can readily be identified and ascertained from the record alone.*)

Witness our hands at said town the day and year first above written.

.....

.....

.....

Commissioners of Highways.

(*This order should be entered of record in the town clerk's office,* § 4, *subd.* 1, ante.)

No. 13.

Order Dividing a Town into Districts and Assigning Labor Thereto.
(§ 4, subds. 3, 4, *ante.*)

At a meeting duly called and held for that purpose, the undersigned, commissioners of highways of the town of ....., ... county, N. Y., hereby divide said town into highway districts, as follows:

Highway District No. 1 shall include (*here insert the description of highway district*); and, due regard being had to proximity of residence, all inhabitants in said district liable to work on highways, together with the following corporations, so liable, to wit: (*insert names*); and the following other persons so liable, to wit: (*insert names*) are hereby assigned to said district to work therein.

Highway District No. 2 shall include, etc. (*continue as above with all the districts*).

Witness our hands at said town this ..... day of ....., 190..

.....

.....

.....

Commissioners of Highways.

No. 14.

Petition for Separate Highway District.
(§ 4, subd. 3, *ante.*)

In the Matter
of the
Application of Certain Electors for the Establishing of a Separate Highway District in the Town of ....., ... County, N. Y.

To the Commissioners of Highways of the Town of .....,
..... County, N. Y.:

The undersigned, your petitioners, respectfully show:

First. That your petitioners are electors of and inhabitants of the territory hereinafter described, which territory contains a population of not less than one hundred and fifty, to wit: ..... (*state population of proposed district*); that said territory does not include a part of a city or village; that the total of taxable persons in said territory as appears by the last preceding assessment-roll of the town is .....; that the property of such territory as appears by the last preceding assessment-roll of the said town is ..... dollars ($); that the total number of electors of such territory is ....., and that your petitioners constitute (*upwards of*) two-thirds of the electors of such territory, to wit: ..... (*state number of petitioners*) of them; and that your petitioners represent (*upwards of*) two-thirds of the taxable property in such territory, to wit: ..... dollars ($), out of a total of ..... dollars ($) therein.

Second. That the territory above referred to, and of which it is proposed that a separate highway district be established, does not exceed one square mile, its area being ...., and it being described as follows: (*here insert description of proposed district*).

WHEREFORE, your petitioners pray that such territory may be established as a separate highway district as provided by law.

Dated ....., 190..

[*Signatures of petitioners.*]

No. 15.

Verification.

(§ 4, subd. 3, *ante.*)

STATE OF NEW YORK,
COUNTY OF ..... } *ss.:*
TOWN OF .....

....., being duly sworn, deposes and says that he is one of the petitioners named in the foregoing petition; that he has read the same and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

.....

Subscribed and sworn to before me
this .... day of ....., 19..

.....
Notary Public [or as may be].

No. 16.

Petition for Abolition of Separate Highway District.

(§ 4, subd. 3, *ante.*)

[*Adapt from form No.* 13, ante.]

No. 17.

Order Establishing Separate Highway District.

(§ 4, subd. 3, *ante.*)

[*Entitle as in form No.* 13, ante.]

A verified petition having on the ..... day of ..... been duly presented to the undersigned commissioners of highways of the town of ....., ... county, N. Y., for the establishing of a territory hereinafter described as a separate highway district, and said petition being in due form and containing

all the matters required by subdivision 3 of section 4 of the Highway Law, and the undersigned commissioners having duly met and considered the prayer of the petitioners, it is

ORDERED, That the following described territory be and the same is hereby established as a separate highway district; being described as follows: (*insert description of highway district in the same manner as required for other highway districts*).

Witness our hands at said town this ..... day of ....., 190..

.....

.....

.....

Commissioners of Highways.

(*Adapt order extending or discontinuing a separate highway district from the above.*)

No. 18.

Order Appointing Overseers.

(§ 4, subd. 5, *ante.*)

We, the undersigned commissioners of highways of the town of ....., ... county, N. Y., do hereby appoint the following persons to be overseers of the highway districts of said town set opposite their respective names for the ensuing year:

Highway District No. 1, ...

Highway District No. 2, ...

(*Continue in like manner with all districts of the town.*)

Witness our hands at said town this ..... day of ....., 190..

.....

.....

.....

Commissioners of Highways.

(*See* § 4, *subd.* 5, ante, *as to duty of town clerk to notify overseers of their appointment.*)

No. 19.

Order Appointing Overseer to Fill a Vacancy.
(§ 4, subd. 5.)

The undersigned commissioners of highways of the town of ....., ... county, N. Y., at a meeting duly called and held for that purpose, hereby appoint ..... to be overseer of Highway District No. ...., in said town, in the stead of ....., who, having been duly appointed, has refused to serve (*or* his office has become vacant by reason of [here give reason, as death, resignation, etc.]).

Witness our hands at said town this ..... day of ....., 190..

.....

.....

.....

Commissioners of Highways.

No. 20.

Overseer's Report of Necessary Repairs.
(§ 4, subd. 9, *ante*.)

The undersigned overseer of highways of Highway District No. ...., in the town of ....., ... county, N. Y., hereby reports, pursuant to the provisions of subdivision 9 of section 4 of the Highway Law, such repairs of the highways and bridges in said district as he deems necessary.

The highway known as the "Franklin Road" should be (*here give repairs deemed necessary*) and highway known as (*continue as above*).

The bridge over "Ellis Creek" at its intersection with said "Franklin Road" should be entirely replanked (*or as the case may be*).

Dated ....., 190..

.....

Overseer of Highways.

To ....., Esq., Commissioner of Highways, etc.

No. 21.

Petition for Erection of Guide Board.

(§ 5, *ante.*)

To the Commissioners of Highways of the Town of .....,
..... County, N. Y.:

The undersigned, who are five resident taxpayers of said town (or, The undersigned, who are twenty resident taxpayers of said county), hereby request the erection of a guide board at the intersection of the ..... road in said town with the ..... road, likewise in said town, and we respectfully suggest that the following inscriptions and devices be placed upon such guide board (*here state the directions, etc., which it is desired to have upon the guide board, and if other guide boards are desired, continue the application in the above form requesting their erection*).

Dated ....., 190...

.....
.....
.....
.....
.....

(*Signatures of Applicants.*)

No. 22.

Consent of Town Board to Repairs, etc.

(§ 10, *ante.*)

At a special meeting of the Town Board of the town of ....., ... county, N. Y., duly called and held on this ..... day of ....., 190...

The highway (*or bridge*) in said town known as the (*Franklin road, or, South Bend bridge*), having been damaged (*or*, destroyed, or, having become unsafe) by (*e. g.*, a freshet), consent is hereby given pursuant to section 10 of the Highway Law, for the commissioners of highways to cause the same to be immediately repaired (*or* rebuilt) pursuant to said section 10.

This consent is given, however, upon the express condition that the said commissioners of highways shall (*here insert any limitations desired*).

Witness our hands at said town this ..... day of ....., 190...

.....
Supervisor.

.....
Town Clerk.

.....
Justice of the Peace.

.....
Justice of the Peace.
Constituting said Town Board.

No. 23.

Request to Convene Town Board.

(Highway Law, § 11, *ante.*)

To the Supervisor (or, *Town Clerk*) *of the Town of .....,*
..... County, N. Y.:

The undersigned commissioners of highways of said town hereby request that you convene the Town Board in special sessions, for the purpose of auditing the bills and expenses incurred in the erection (*or repairs*) of the Franklin road (*or South Bend bridge*) done under the consent thereto given by said Board on the ..... day of ....., 190...

Dated this ..... day of ....., 190...

.....
.....
.....
Commissoners of Highways.

No. 24.

Account for Services and Materials.

(§ 12, *ante;* Town Law, § 167.)

....., N. Y., ..., 190...

The Town of ....., ... County, N. Y.

To ....., Dr.

190...

April 1. To ..... days' labor (with team)..... $.....

April 2. To ..... ft. of lumber, at $.... per M... .....

Total ..... $.....

No. 25.

Affidavit to Above Claim.

(§ 12, *ante;* Town Law, § 167.)

STATE OF NEW YORK,
COUNTY OF ..... } *ss.:*
TOWN OF .....

....., being duly sworn, says that he is the claimant named in the above account; that the items of such account are correct, and that the disbursements and services charged therein have been, in fact, made and rendered, and that all materials have been supplied as therein stated, and that no part of the sum has been paid or satisfied.

.....

Subscribed and sworn to before me this
.... day of ....., 190...

.....,
Notary Public.

No. 26.

Commissioners' Certificate to Claim.
(§ 12, *ante.*)

The undersigned commissioners of highways of the town of ....., ... county, N. Y., do hereby certify that the services charged in the foregoing account of ..... has been actually performed at our request, and that the materials charged therein were actually furnished at our request.

Dated this ..... day of ....., 190...

.....
.....
.....
Commissioners of Highways.

No. 27.

Complaint against Unsafe Toll-Bridge.
(§ 13, *ante.*)

In the Matter
of the
Toll Bridge in the Town of ....., ... County, N. Y., known as the ..... Bridge (*or otherwise describe it*).

STATE OF NEW YORK,
COUNTY OF ..... } *ss.:*
TOWN OF .....

....., being duly sworn, says that the toll bridge, belonging to the ..... Company and situate at the intersection of the ..... river with the ..... road, has become and is unsafe for the public use, for the reason that (*details of the defective condition do not seem to be required, but it is best to set them forth at this point.*)

WHEREFORE, Your deponent asks that the commissioners of highways of said town make a careful and thorough examination

of said toll bridge and take such further proceedings as are provided by law.

.....

Subscribed and sworn to before me this
.... day of ....., 190...

.....

Notary Public (or as may be).

To .....
.....
.....

Commissioners of Highways of the Town of .....,
..... County, N. Y.

No. 28.

Notice to Owners of Unsafe Toll-Bridge.
(§ 13, *ante.*)

To ..... (*owners or agents as required by section* 13, ante):

You will please take notice that we have, on complaint made, carefully and thoroughly examined the toll bridge maintained by you and situated (*describe as in complaint*) and find it unsafe for the public use in the following particulars:

.....
.....
.....

(*while the statute is silent upon specifying particular defects complained of, it will be best to state them in detail at this point*).

YOU WILL, THEREFORE, Immediately upon receipt hereof commence repairing the same, and complete the repairs as required by section 13 of the Highway Law under such liability as is therein prescribed for your failure so to do.

Dated at said town this ..... day of ....., 190...

.....
.....
.....

Commissioners of Highways of the Town of ....., ... County, N. Y.

No. 29.

Application to Lay Pipes in a Highway.

(§ 14, *ante.*)

To the Commissioners of Highways of the Town of ....., ... *County, N. Y.:*

The undersigned, who is a resident of the town above named, hereby respectfully makes application for permission to lay and maintain drainage pipes (*or,* sewer or water pipes, *or,* hydrants, *or, any of them*) within that portion of the Franklin road described as follows (*here describe route intended to be followed*), pursuant to the provisions of section 14 of the Highway Law, and for the purpose of draining swamps (*or, as the case may be*).

Dated this ..... day of ....., 190...

.....

(*Applicant's Signature.*)

No. 30.

Consent to Laying Pipes in a Highway.

(§ 14, *ante.*)

Application having been made by ..... to the undersigned commissioners of highways of the town of ....., ..., county, N. Y., for permission to lay and maintain drainage pipes (*or as the case may be*) within the highway in said town known as the "Franklin road" for the purpose of draining swamps (*or as the case may be*), and the undersigned having duly considered said application, do hereby grant permission to the said ..... to lay such pipes within said highway along the western side (*or as the case may be*) thereof, but not under the traveled part of the same (*except across the same*).

This consent is given upon the express conditions that such pipes or hydrants shall be so laid as not to interrupt or interfere with public travel upon the said highway, and upon the further condition that the applicant will replace all earth removed and leave the highway, in all respects, in as good condition as before the laying of said pipes; and that the applicants will keep such

pipes and hydrants in repair and save the town harmless from all damages which may occur by reason of their location in the highway; and that upon notice by the commissioners the applicant will make any repairs required for the protection or preservation of the highway; and that upon his default such repairs may be made by the commissioners at the expense of the applicant, and that such expense shall be a lien, prior to any other lien, upon the land benefited by the use of the highway for such pipes (*or hydrants*); and that the commissioners may also, upon the applicant's default, revoke the permission for the use of the highway and remove therefrom such pipes (*or hydrants*).

Dated at said town this ..... day of ....., 190...

.....

.....

.....

Commissioners of Highways.

(*This consent must be executed in duplicate and indorsed, filed, accepted, etc., as provided in* § 14, ante.)

No. 31.

Supervisor's Approval of Above Consent.

(§ 14, *ante.*)

I, ..., supervisor of the town of ....., ... county, N. Y., do hereby approve the within consent of the commissioners of highways to the laying of certain pipes in the highway as therein mentioned.

Dated at said town this ..... day of ....., 190...

.....

Supervisor.

(*This approval must be indorsed upon the consent.*)

No. 32.

Acceptance of Consent to Laying Pipes in Highway.

(§ 14, *ante.*)

I, ..., the applicant to whom the within consent to lay pipes in the Franklin road has been granted, do hereby accept the same.

Dated at said town this ..... day of ....., 190...

(*Signature of Applicant.*)

(*This acceptance must be indorsed upon the consent.*)

No. 33.

Statement of Cause of Action.

(§ 16, *ante.*)

STATE OF NEW YORK,
COUNTY OF ..... } *ss.:*
TOWN OF .....

....., being duly sworn, deposes and says that he resides in the town aforesaid, and that he makes this verified statement of his cause of action against the said town for damages to his person (*or, property*) sustained by reason of a defect in a highway (*or bridge*) of said town, existing because of the neglect of a commissioner of highways thereof.

That the accident whereby your deponent sustained said injury occurred on the 15th day of May, 1902, at about 9 o'clock in the evening; that said accident occurred as follows (*state circumstances as in a complaint*).

That the accident was due solely to the negligence of the said town of ..... in (*as may be*).

That your petitioner received from said accident divers bodily injuries as follows (*here describe the injuries*) and was, and ever since has been sick, sore, lame and disabled therefrom to his damage $.....

WHEREFORE, Deponent claims such amount and asks that that sum be paid to him for said injuries.

(*Signature of Applicant.*)

Subscribed and sworn to before me this
..... day of ....., 190...

.....
Notary Public.

(*The above form should be supplemented with the various incidents showing the negligence of the town and the deponent's freedom from contributory negligence and the extent of his injuries. The defect complained of should be carefully pointed out.*)

No. 34.

Report of Commissioners of Highways.

(§ 19, *ante.*)

(*As to when this report is to be given, see* § 19, ante.)

The undersigned commissioners of highways of the town of ....., ... county, N. Y., hereby make to the town board of said town the following report:

1. The labor assessed in said town for the year ending ....., 190..., was ..... days, and the labor performed in said town during said year was ..... days.

2. We have received during the said year for penalties, commutations and from all other sources ..... dollars ($....), and following is an itemized account of all moneys we have paid out during the said year, and for all of which receipts or vouchers in full were taken and are herewith submitted.

3. The improvements which have been made on the highways and bridges during the year immediately preceding this report and the state of such bridges and highways in each highway district is as follows:

The said improvements are as follows: (*here state in detail the improvements made during the preceding year*).

The state of such bridges and highways is as follows: (*here give in detail the state of the bridges and highways by districts*).

Dated this ..... day of ....., 190...

.....

.....

.....

Commissioners of Highways.

[*Add any matters necessary under* § 139, ante.]

No. 35.

Report of Commissioners of Highways.

(§ 19, *ante.*)

(*This report is to be made at the second meeting of the town board in each year.*)

The undersigned commissioners of highways of the town of ....., hereby render to the town board of said town the following report:

1. A statement of the improvements necessary to be made on the bridges and highways in each highway district is as follows (*here state in detail the improvements necessary*).

The probable expense of making such improvements beyond what the labor to be assessed during the year will accomplish is estimated by us at ..... dollars ($.....).

Dated at said town this ..... day of ....., 190...

.....

.....

.....

Commissioners of Highways.

(*This report to be executed in duplicate and a copy thereof delivered to the supervisor of the town,* § 19, ante.)

No. 36.

Notice Requesting the Removal of Obstruction.

(§ 21, *ante.*)

To ....., *Esq., Overseer of Highways of the* .....
Highway District of the Town of ....., ...
County, N. Y.:

We, the undersigned, who are two (*or, more*) inhabitants of the aforesaid town liable to the payment of highway taxes, hereby request the removal of the obstruction to the Franklin road, opposite the premises of ....., caused by snow.

Dated this ..... day of ....., 190...

(*Signatures of Applicants.*)

No. 37.

Complaint to Commissioner against Overseer.

(§ 23, *ante.*)

To the Commissioners of Highways of the Town of .....,
..... *County, N. Y.:*

The complaint of ...., a resident of the town of ....., ... county, N. Y., respectfully shows that ...., the overseer of highways for highway district No. ..., in said town, has neglected and refused to (warn ..... to work on the highways in said district), after having been required so to do by the commissioners of highways. And the said ..... hereby requires you to prosecute the said .... for said offense.

Dated this ..... day of ....., 190...

(*Give undertaking as provided in* § 23, ante, *if it becomes necessary. For forms of acknowledgment, justification and approval see Forms Nos.* 3, 4 and 5, ante.)

No. 38.

Order Dividing Town into Commissioner Districts.

(§ 25, *ante.*)

At a regular (or, special) meeting of the town board of the town of ....., ... county, N. Y., duly called and held on the ..... day of ....., 190...

ORDERED, That said town be divided into three highway commissioner districts and assigned to the commissioners of highways of said town, as follows:

The first highway commissioner district shall include the following: Beginning at the intersection of the Franklin road by the South Bend bridge and continuing (*continue the description until the district is fully described*), and this district is assigned to ....., one of the said commissioners of highways.

The second commissioner district shall include (*continue as above, giving a brief and accurate description of the boundaries of each district*).

Done at said town the day and year first above written.

....., *Supervisor.*
....., *Town Clerk.*
....., *Justice of the Peace.*
....., *Justice of the Peace.*
Constituting said Town Board.

(*For the required publication of notice of division into commissioner districts, see* § 25, ante.)

No. 39.

Overseer's List of Inhabitants.

(§ 31, *ante.*)

I, ..., overseer of highways, in District No. ...., of the town of ....., ... county, N. Y., do hereby certify that the following is a true and accurate list of names of all the inhabitants in said highway district, who are liable to work on the highway:

Names.	Names.
.....	.....
.....	.....
.....	.....
.....	.....
.....	.....

Dated at said town this ..... day of ....., 190...

.....

Overseer of Highways.

(*This list to be delivered to the town clerk within sixteen days after the overseer's appointment,* § 31, ante.)

No. 40.

List and Statement of Non-Resident Lands.

(§ 32, *ante.*)

We, the undersigned commissioners of highways of the town of ....., ... county, N. Y., before making the assessment for highway labor, make the following list and statement of the contents of all unoccupied lots, pieces or parcels of land within said town, owned by non-residents and set down opposite the description of the same, their respective values, such values being the same affixed to the lot in the last assessment-roll of the town, except that where any such lots were not separately valued in such roll then in proportion to the valuation which was affixed to the whole tract of which such lot is a part.

NAME OF TRACT (see subd. 1 of note following this form.)

Lot numbers, if tract is subdivided (if part of lot distinguished by boundaries or in some other way).	Quantity of land.	Value of land.
....	....	....
....	... .	....
....	....	..... .
....	... .	.....

Dated this ..... day of ....., 19...

....., ...,

....., ...,

....., ...,

Commissioners of Highways.

NOTE.—Commissioners are directed to describe non-resident land in the same manner as is required from assessors. The requirement as to assessors describing non-resident land is as follows:

1. Designate the tract by its name, if known by one, or if not distinguished by a name or the name is unknown, state by what lands it is bounded.

2. Place in the first column the numbers of all unoccupied lots of any subdivided tract, without the names of the owner, beginning at the lowest number and proceeding in numerical order to the highest, but the entry of the name of the owner shall not affect the validity of the assessment.

3. In the second column and opposite the number of each lot, the quantity of land therein.

4. In the third column and opposite the quantity, the full value thereof.

5. If it be a part of a lot, the part must be distinguished by boundaries or in some other way by which it may be identified. If any such real property be a tract not divided or whose subdivisions cannot be ascertained by the assessors, they shall certify in the roll that such tract is not subdivided, or that they cannot obtain correct information of the subdivisions and shall set down in the proper column the quantity and valuation as herein directed. If the quantity to be assessed is a part only of a tract, that part, or the part not liable must be particularly described. (*Tax Law*, § 29.)

No. 41.

Commissioners' Assessment of Highway Labor.

(§ 33, *ante.*)

The undersigned commissioners of highways of the town of ....., in the county of ....., N. Y., having met for the purpose of ascertaining, assessing and apportioning the highway labor to be performed in said town the ensuing year, all the commissioners being present and having deliberated thereon, do hereby ascertain, estimate and assess as follows:

1. The whole number of days work to be assessed for the year is ascertained and determined to be .... days, being at least three times the number of taxable inhabitants in said town.

2. Every male inhabitant above the age of twenty-one years (excepting all honorably discharged soldiers and sailors who lost an arm or leg in the service of the United States, during the late war, or who are unable to perform manual labor by reason of injuries received or disabilities incurred in such service, members

of any fire company formed or created pursuant to any statute, and situated within such town, persons seventy years of age, clergymen and priests of every denomination, paupers, idiots and lunatics), there being ....., all hereinafter named, is assessed (*at least*) one day.

3. The residue of such work being .... days, is assessed and apportioned upon the estate, real and personal, of every inhabitant of the town, including corporations and occupants of non-resident lands taxable therein, as shown in the following schedule, and it appearing from the last annual returns of the overseers of highways in highway districts Nos. ..., ... and ... of said town, that several persons and corporations who were assessed to work on the highways in the said district have neglected to work the whole number of days assessed and have not commuted therefor or otherwise satisfied such deficiency, we, therefore, pursuant to section 40 of the Highway Law, hereby reassess the said deficiencies of such persons and corporations and have added such deficiencies with the particulars of the reassessment thereof to the assessment of such persons herein:

NAMES.	Value of property.	Number of days.
A. B.....	$1,200 00	3
C. D....	2,000 00	5
C. D. (reassessed 1901).....	.....	5
E. F..	....	1

All lands in said town owned by non-residents and contained in the list made by the commisioners and not occupied by an inhabitant of the town, are assessed as follows:

Description of Land (as in list of non-residents)..	Quantity.	Valuation.	Number of days.

Witness our hands this ..... day of ....., 19...

.....,

.....,

.....,

Commissioners of Highways.

No. 42.

Notice of Desire to Work Unopened Highway.

(§ 33, subd. 5, *ante.*)

To ....., ... *and* ....., *Commissioners of Highways of the Town of* ....., ... *County, N. Y.:*

YOU WILL PLEASE TAKE NOTICE, That the undersigned, who is an inhabitant of said town, desires to apply the whole (*or any part*) of his highway labor, pursuant to section 33 of the Highway Law upon (*describe the highway or part thereof*) which is a (part of a) highway in said town that the commissioners of highways of said town have neglected to open and work for one year after it was laid out and title thereto acquired.

Dated this .... day of ....., 190..

.....,
Applicant.

No. 43.

Overseer's Road Warrant.

To ....., *Overseer of Highways in District No. ...., of the Town of* ....., ... *County, N. Y.:*

I. You will give at least twenty-four hours' notice to all residents of your district, and corporations herein assessed to work upon the highways therein, of the time and place at which they are to appear for that purpose, and with what teams and implements, and that they will be allowed at the rate of one day for every eight hours of work on the highways, between seven o'clock in the forenoon and six o'clock in the afternoon. The notice to corporations shall be served personally on an agent thereof residing in the town, if any, or if none, by filing the notice in the office of the town clerk at least five days before the labor shall be required; and any number of days, not exceeding fifty, may be required to be performed by any such corporation in any one day.

II. You will give at least five days' notice to every resident agent of every non-resident landholder, whose lands are assessed, of the number of days such non-resident is assessed, and the time and place at which the labor is to be performed. If you cannot ascertain that such non-resident has an agent within the town, you will file a written notice in the office of the town clerk, at least twenty days before the time appointed for performing such labor, containing the names of such non-residents, when known, and a description of the lands, with the number of days' labor assessed on each tract, and the time and place at which the labor is to be performed.

III. Every person and corporation shall work the whole number of days for which he or it shall have been assessed except such days as shall be commuted for at the rate of one dollar per day, and such commutation money shall be paid to you within at least twenty-four hours before the time when the person or corporation is required to appear and work on the highways; but any corporation may pay its commutation money to the commissioners of highways of the town, who will pay the same to you as such overseer.

IV. You may require a team, or a cart, wagon or plow, with a pair of horses, or oxen, and a man to mange them, from any person having the same within your district, who shall have been assessed three days or more, and each person furnishing the same upon such requisition shall be entitled to a credit of three days for each day's service therewith.

V. The names of persons or corporations omitted from this list, and of new inhabitants, shall from time to time be added thereto, and they shall be assessed by you as such overseer in proportion to their real and personal estate, to work on the highways as others assessed by the commissioners on this list, subject to an appeal to the commissioners of highways.

VI. Every person or corporation assessed to work on the highways, and warned, who does not commute therefor, may appear in person or by an able-bodied man as a substitute. A day's labor shall be eight hours of work, and every person or corporation

assessed more than one day shall be allowed to work ten hours in each day.

VII. You shall, as such overseer of highways, on or before the first day of September, of each year (*or as may be*), make out and deliver to the commissioner of highways of your town, a list of all persons and corporations who have not worked out or commuted for their highway assessment, with the number of days not worked or commuted for by each, charging for each day in such list at the rate of one dollar and fifty cents per day; and also a list of all the lands of non-residents and persons unknown, which were assessed on your warrant by the commissioners of highways or added by you on which the labor assessed has not been performed or commuted for, and the number of days' labor unpaid by each, charging for the same at the rate of one dollar and fifty cents per day, which list shall be accompanied by your affidavit that you have given the notice required to appear and work, and that the labor specified in the list returned has not been performed or commuted.

VIII. You shall on the second Tuesday next preceding the time for holding the annual town meeting in your town, within the year for which you are elected or appointed, render to one of the commissioners of highways of the town, an account in writing, verified by your oath and containing:

1. The names of all persons assessed to work on the highways in the district of which you are overseer.

2. The names of all those who have actually worked on the highways, with the number of days they have so worked.

3. The names of all those from whom penalties have been collected and the amounts thereof.

4. The names of all those who have commuted, and the manner in which the moneys arising from penalties and commutations have been expended by you.

5. A list of all persons whose names you have returned to the commissioners of highways as having neglected or refused to work out their highway assessments, with the number of days and the amount of tax so returned for each person, and a list of all the lands which you have returned to the commissioners of highways

for non-payment of taxes and the amount of tax on each tract of land so returned; and you shall then and there pay to the commissioners of highways all money remaining in your hands unexpended.

If any owner or occupant (for a term of one or more years) shall fail to cut all noxious weeds, briers and brush growing upon his lands within the bounds of the highway between the fifteenth day of June and the first day of July, and between the fifteenth day of August and the first day of September, you shall give written notice to any occupant of the premises to cut all such noxious weeds, briers and brush; if such owner or occupant shall not cut such weeds, briers and brush as so required within ten days after receiving such notice you shall do such work and make a report under oath to the supervisor of the amount expended by you thereon, and the ownership and occupancy of the several parcels of land against which the labor was performed on or before the first day of November in each year.

X. Below herein is given the names of all residents of your district and corporations assessable to work upon the highways therein and the number of days of highway labor assessed to and to be performed by each the ensuing year; also a list and statement of all unoccupied lots, pieces or parcels of land within the town, owned by non-residents; with a description of every such lot described in the same manner as is required from assessors, and its value and the number of days assessed set down opposite the description.

Witness our hands this .... day of ....., 190..

.....

.....

.....

Commissioners of Highways.

(*Attach lists of inhabitants as furnished by overseer and descriptions of non-resident lands as made out by commissioners, adding number of days assessed and signatures of commissioners.*)

No. 44.

Notice of Appeal by Non-Resident.
(§ 36, *ante.*)

In the Matter
of the
Appeal of....., a Non-resident Owner of Unoccupied Lands from an Assessment of Highway Labor.

....., respectfully shows that he is a non-resident owner of unoccupied land situated in the town of ....., ... county, N. Y., and that he considers himself aggrieved by an assessment of highway labor upon such lands made by ....., ... and ....., commissioners of highways of said town, on the ..... day of ....., 190..., and hereby appeals to the county judge of the said county of ..... in which such land is situated to have such assessment corrected.

Dated at said town this ..... day of ....., 190...

.....

No. 45.

Notice of Hearing of Appeal.
(§ 36, *ante.*)

You will please take notice that the appeal of the undersigned non-resident from your assessment of highway labor upon unoccupied lands in your town will be heard by the county judge at his chambers in the city of ....., N. Y., on the .... day of ....., at ... o'clock in the .....noon.

Dated this ..... day of ....., 190...

.....

To ....., ... and .....,
Commissioners of Highways of the Town of .....,
..... County, N. Y.

No. 46.

Assessment by Overseer.

(§ 42, *ante.*)

WHEREAS, I, ..., overseer of Road District No. ...., in the town of ....., ... county, N. Y., do not deem the labor assessed on the inhabitants of said town of ....., for the year 190... sufficient to keep the highways in said district in repair;

THEREFORE, I do hereby further assess the following named persons (*actual residents in said district only*) the amount of labor set opposite their respective names, being in the same proportion, as near as may be, and not to exceed one-third of the number of days assessed in the same year by the said commissioners on the inhabitants of said district.

NAMES.	Days.	NAMES.	Days.

Witness my hand this ..... day of ....., 190...

.....

Overseer.

No. 47.

Order Authorizing Shade Trees and Sidewalks.

(§ 43, *ante.*)

We, the undersigned (*majority of the*) commissioners of highways of the town of ....., ... county, N. Y., do hereby authorize ....., ... and ....., the owners of property adjoining the Franklin road in said town, at their own expense, to locate and plant trees and locate a sidewalk along said highway in conformity with the topography thereof and in accordance with the map (*or diagram*) showing

location of the sidewalks and tree planting attached hereto and made a part hereof.

Dated this ..... day of ....., 190...

.....
.....
.....
Commissioners of Highways.

(*Attach a map or diagram showing the location of the sidewalks and trees and file the same and order in the town clerk's office within ten days,* § 43, ante.)

No. 48.

Application to Anticipate Sidewalk Tax.

(§ 45, *ante.*)

We, the undersigned, who are a majority of the inhabitants of Highway District No. .... of the town of ....., ... county, N. Y., subject to assessment for highway labor therein, respectfully request you to authorize (*one-fourth*) of the highway labor of this district or of the commutation money received therefor to be expended under the direction of the overseer of highways of this district in the construction, repairs and improvement of the following sidewalks within the limits of the district (*here describe the sidewalks*), ..., and likewise ask your authority that (*one-fourth*) of the highway labor of the district be anticipated for (*not more than*) three years for constructing, improving and repairing said sidewalks.

Dated this ..... day of ....., 190...

(*Signatures of all Applicants.*)

No. 49.

Order Allowing Anticipation of Sidewalk Tax.

(§ 45, *ante.*)

Written application in due form having been made to us by the majority of the assessable inhabitants of Highway District No. ..., in the town of ....., ... county, N. Y., to authorize

an allowance and an anticipation of highway labor in said district for the construction, repair and improvement of certain sidewalks, and it appearing to us, at a meeting duly called and held to consider the same, that the same is desirable, it is hereby

ORDERED, That one-fourth of the highway labor of the said district or of the commutation money received therefor be expended under the direction of the overseer of the highways of the district in the construction, repairs and improvement of the following sidewalks within the limits of the district (*here describe the sidewalks*); and, it is further

ORDERED, That one-fourth of the highway labor of the district may be anticipated for (*not more than*) three years for constructing, improving and repairing such sidewalks, pursuant to section 45 of the Highway Law.

Witness our hands at said town this ..... day of ....., 190...

.....
.....
.....

Commissioners of Highways.

No. 50.

Certificate of Anticipation.

(§ 46, *ante.*)

I, ..., overseer of highways for Highway District No. ...., in the town of ....., ... county, N. Y., do hereby certify, pursuant to section 46 of the Highway Law, that ..... has anticipated and worked (*or,* commuted for) ..... days' highway labor, and, pursuant to said section 46 of the Highway Law, is entitled, upon presentation of this certificate, to be credited by the overseer of highways for this district with the performance of the number of days' labor assessed for each successive year until the credit shall equal the number of days stated in this certificate to have been anticipated.

Dated at said town this ..... day of ....., 190...

.....

Overseer of Highways.

No. 51.

Transfer of Certificate of Anticipation.
(§ 47, *ante.*)

I, ..., the owner of the real estate upon which the highway labor covered by the foregoing certificate of anticipation was assessed, do now, upon the voluntary grant of the said real estate, transfer and set over unto ....., the grantee of said real estate, this certificate of anticipation, together with all my right thereunder.

Dated this ..... day of ....., 190...

.....

In the presence of

.....

No. 52.

Request to Vote on Change of System of Taxation.
(§ 51, *ante.*)

We, the undersigned, who are twenty-five taxpayers of the town of ....., ... county, N. Y., hereby request that the electors of the said town may, at the next biennial (*or,* special) town meeting, vote by ballot upon the question of changing the system of taxation for working the highway.

Dated this ..... day of ....., 190...

(*Signatures of all Petitioners.*)

No. 53.

Notice of Assessment of Costs of Cutting Weeds.
(§ 53a, *ante.*)

To ..... (*owner of lands*):

YOU WILL PLEASE TAKE NOTICE, That on the ..... day of ....., 190.., at ... o'clock in the ....noon, at ....., in town of ....., ... county, N. Y., ..., Esq., supervisor of this town will, pursuant to section 53a of the Highway Law, assess the costs of cutting the noxious weeds, briers and brush growing along the sides of the highway upon which your lands in said town front, you having failed to cut them

as required by said section, and they having been cut by us pursuant thereto.

Dated this .. day of ....., 190..

.....
.....
.....

Commissioners of Highways.

No. 54.

Notice to Corporation to be Served on Agent or Filed in Office of Town Clerk.

(§ 60, *ante.*)

To ....., a Corporation (and to ....., Agent of Said Corporation):

Take notice that you ..... are assessed ..... days' labor in Highway District No. ...., in the town of ....., ... county, N. Y., and that said labor is required to be performed on the highway (*state where*) in said district, on the ..... day of ..... next, and the ..... days following, and you are required to furnish (*teams and implements, etc., if any*) and to perform ..... (*not exceeding fifty*) days' labor in a day, and you will be allowed one day for every eight hours of work on said highway between seven o'clock in the forenoon and six o'clock in the afternoon.

Dated this ..... day of ....., 190...

.....

Overseer of Said Highway District.

No. 55.

Notice to Agent of Non-Resident.

(§ 61, *ante.*)

To ....., a Non-resident Owner of Lands in Town of ....., ... county, N. Y., and to ....., His Agent:

Take notice that ....., a non-resident of the said town, is assessed ..... days' labor in Highway District

No. ...., in said town, and that said labor is required to be performed on the highway (*state where*) in said district on the ..... day of ..... next, and the ..... days following.

Dated this ..... day of ....., 190...

.....

Overseer of Said Highway District.

No. 56.

Notice to Non-Residents to be Filed.

(§ 61, *ante.*)

Notice is hereby given that the highway labor assessed on the following-described parcels of lands in the town of ....., ... county, N. Y., owned by non-residents, is required to be performed on the .... day of ..... next, in Highway District No. ...., in said town, on the highway (*state where*).

NAMES.	Description of lands.	Number of days assessed.

Dated ....., 190...

.....

Overseer of Said Highway District.

No. 57.

Application for a County Highway or Bridge, Etc.

(County Law, § 61, *ante.*)

To the Board of Supervisors of the County of ....., N. Y.:

We, the undersigned, being twenty-five resident taxpayers of the county of ....., hereby make application, in pursuance of section 61 of the County Law, for the laying out (opening, altering, etc.) of a county highway (*or*, the construction, etc.

of a county bridge) described as follows (insert an accurate description of the highway *or* bridge).

Dated this ..... day of ....., 190...

(*Signatures.*)

No. 58.

Resolution of Board of Supervisors Granting Application.

(County Law, § 61, *ante.*)

At a meeting of the board of supervisors of the county of ....., N. Y., held at ....., on the .... day of ....., 190...

WHEREAS, Application has been made for the laying out (*or* altering *or* discontinuing) of a highway in said county; and,

WHEREAS, Satisfactory proof has been made to us of the due service of a copy of such application, together with a notice of intention to make the same, upon a commissioner of highways of each town in said county,

Resolved, That a highway be laid out in accordance with such application, as follows: (*insert survey*).

....,

Chairman.

....,

Clerk.

No. 59.

Overseer's Return to Commissioner of Highways.

(§ 66, *ante.*)

To the Commissioners of Highways of the Town of .....,
..... County, N. Y.:

The following is a list of all persons and corporations in highway district No. ..., in the town of ....., ... county, N. Y., who have not worked out or commuted for their highway assessment, with the number of days not worked or commuted for by each, charging for each day in such list at the rate of one dollar and fifty cents per day; and also a list of all the lands of non-residents and persons unknown, which were assessed on your warrant, for the year 190.., by the commissioners of

highways, or added by me, on which the labor assessed has not been performed or commuted for, and the number of days' labor unpaid by each, charging for the same at the rate of one dollar and fifty cents per day:

OWNER'S NAME.	Description of lands.	Assessed value.	No. of days assessed.	Days not worked or commuted for.	Amount.
....	.....	.....	.....	....	$.... ....
. . ..	....	.....	....	....	.....
....	....	.....	....	.. ..	....
.. ..	....	.. ..	....	....	. .....

List of lands of non-residents, etc.:

NAME OF OWNER.	Description of lands (as in commissioner's list).	Assessed value.	No. of days assessed.	No. of days unpaid.	Amount.
....	. ...	.. ..	....	.. . .	$..... ..
.. ..	....	....	....	....	... .
....	... .	.. ..	... .	.....	.....
....	.. ..	. ...	.....	... .	.....

....,

Overseer of Highways.

STATE OF NEW YORK,
COUNTY OF ..... } *ss.:*
TOWN OF .....

....., being duly sworn, says that he is overseer of the highways of highway district No. ...., in the Town of ....., ... county, N. Y.

Deponent further says he has given the notice required, to appear and work, to wit, all notices provided in the Highway Law, and that the labor specified in the foregoing list returned has not been performed or commuted.

....

Subscribed and sworn to before me, this
.... day of ....., 190...

.....

Notary Public.

No. 60.

Overseers' Annual Account.

(§ 69, *ante.*)

To ....., Commissioner of Highways of the Town of ....., ... County, N. Y.:

I, the undersigned overseer of highway, of highway district No. ....., in said town, pursuant to law, renders the following annual account:

THE FOLLOWING IS A LIST OF:

1. The names of all persons assessed to work on the highway in the district of which I am overseer;

2. The names of all those who have actually worked on the highways, with the number of days they have so worked;

3. The names of all those from whom penalties have been collected, and the amounts thereof;

4. The names of all those who have commuted, and the manner in which the moneys arising from such penalties and commutations have been expended by me;

5. Of all persons whose names I have returned to the commissioners of highways as having neglected or refused to work out their highway assessments, with the number of days and the amount of tax so returned for each person and a list of all the lands which I have returned to the commissioners of highways for non-payment of taxes, and the amount of tax on each tract of land so returned, to wit:

NAMES.	Days assessed to each.	Days worked by each.	Days commuted by each.	Penalties collected from each.
.....	.....	.....	.....	$ .....
.....	.....	.....	.....	.....
.....	.....	.....	.....	.....
Total.....	.....	.....	.....	$.....

A list of all persons returned to commissioners of highways as having neglected or refused to work out their highway assessment:

NAMES.	Days assessed.	Amount returned.
		$
Total		$

A list of all lands returned to the commissioners of highways for non-payment of taxes and the amount of tax on each tract of land so returned:

NAMES.	Description (as in commissioners' list).	Amount returned.
		$
Total		$

Statement of manner in which moneys arising from penalties and commutations have been expended:

RECEIPTS.

Penalties ....
Commutations ....

Total ....

EXPENDITURES.

Cash paid for ....
Cash paid for ....
Cash paid for ....

Total ....

Leaving a balance in my hands of ....

....., *Overseer of Highways.*

STATE OF NEW YORK,
COUNTY OF..... } *ss.:*
TOWN OF.....

....., being duly sworn, says that he is the overseer of highways for highway district No. ...., of the town of ....., ... county, N. Y., and that the foregoing account subscribed by him is in all respects true and correct.

....

Subscribed and sworn to before me this
..... day of ....., 190...

.....
Notary Public (or as may be).

No. 61.

Application to Lay Out Highway Upon Dedication.
(§ 80, *ante.*)

Adapt from form No. 68 *to the*, thence as follows*: who have dedicated the land therefor.

Dated ....., 190..

.....,
Applicant.

No. 62.

Dedication of Land for Highway.
(§ 80, *ante.*)

I hereby dedicate for highway purposes all that tract or parcel of land situated in the town of ....., county of ....., and State of New York, and bounded and described as follows: (*insert description*) hereby releasing said town and all persons whomsoever from all damages by reason of the laying out and opening of a highway across the same.

Witness my hand and seal this .... day of ....., 190..

.....[L. S.]

(*Add acknowledgment as in form No.* 3.)

No. 63.

Order Laying Out a Highway Upon Dedication.

(§§ 80, 81, *ante.*)

At a meeting of the commissioners of highways of the town of ....., ... county, N. Y., duly called and held for the purpose of determining upon laying out the highway hereinafter described, and it appearing that such highway should be laid out, it is

ORDERED, That a highway be laid out in said town as follows: (*insert survey*); the said highway passing through the lands of ....., ... and ....., all of whom have * dedicated lands therefor as appears by their several deeds of dedication and release filed and recorded in the town clerk's office.

Witness our hands at said town this ... day of ....., 190..

.....

.....

.....

Commissioners of Highways.

No. 64.

Application to Lay Out or Alter Highway Upon Release of Damages.

(§ 80, *ante.*)

Adapt form from form No. 68 *to the*, thence as follows*: who have released all damages from the laying out and opening (*or,* altering) of such highway for the following sums: The said ..... for $.... (*and so on*); and they being the only owners of lands taken or affected thereby.

Dated this ..... day of ....., 190...

.....

Applicant.

No. 65.

Release of Damages from Highway.
(§ 80, *ante.*)

I hereby consent that a highway be laid out and opened (*or,* altered) through my lands in the town of ....., ... county, N. Y., as follows (*insert description*) and release said town and all persons whomsoever from all damages caused thereby.

Witness my hand and seal this ..... day of ....., 190...

.....[L. S.]
(*Signature.*)

(*Add acknowledgment as in Form No.* 3.)

No. 66.

Consent of Town Board to Laying Out or Altering a Highway.
(§ 80, *ante.*)

At a meeting of the town board of the town of ....., ...: county, N. Y., duly called and held to consider the matter of consenting to the laying out (*or,* altering) of the hereinafter described highway upon release of damages, it is hereby consented that a highway be laid out (*or,* altered) in said town as follows (*insert description*), said highway passing through lands of ....., ... and ....., who have released their damages therefrom.

Dated ....., 190...

.....
Supervisor.
.....
Town Clerk.
.....
Justice of the Peace.
.....
Justice of the Peace.
.....
Justice of the Peace.
Constituting said Town Board.

No. 67.

Order Laying Out or Altering a Highway Upon Release of Damages.

(§§ 80, 81, *ante.*)

As in form No. 63, *to the*, thence as follows*: released their damages caused thereby for the following sums: ....., for $..... (*and so on*); and the town board of said town consenting to the laying out (*or,* altering) of the same; which releases and consent are filed and recorded in the town clerk's office.

Witness our hands this ..... day of ....., 190...

.....

.....

.....

Commissioners of Highways.

No. 68.

Application to Lay Out, Alter or Discontinue a Highway.

(§ 82, *ante.*)

To ....., ... and ....., Commissioners of Highways of the Town of ....., ... County, N. Y.:

The undersigned, who (resides in,) owns property in and is assessable for highway labor in the said town of ....., hereby applies to you to lay out a new (*or,* alter; *or,* discontinue a) highway in said town as follows: (*Here describe the highway proposed to be laid out or discontinued or the proposed alteration*). That said highway (*or,* alteration) will pass through (*or,* passes) through the lands of ....., ... and .....,* (all of whom consent to the laying out *or,* altering; *or,* discontinuing of said highway).

Dated this ..... day of ....., 190...

.....

Applicant.

No. 69.

Notice of Application for Commissioners on Laying Out, Altering or Discontinuing a Highway.

(§ 83, *ante.*)

COUNTY COURT — ..... County.

In the Matter
of the
Application of ....., to Lay Out (*or*, alter, *or*, discontinue) a Highway in the Town of ....., ... County, N. Y., and the Assessment of Damages Therefor.

YOU WILL PLEASE TAKE NOTICE, That upon the petition herein, with a copy of which you are herewith served and upon the application to you therein referred to and upon proof of service thereof, an application will be made to the ..... County Court, at a ..... term thereof to be held at ..... in the city of ....., on the .... day of ....., 190.., at .... o'clock in the .....noon or as soon thereafter as counsel can be heard for the appointment of three commissioners to determine upon the necessity of a proposed highway (*or, as may be*), described in said petition and to assess the damages by reason of the laying out and opening (*or, as may be*) thereof.

Yours, etc.,

....., *Petitioner.*

Dated this .... day of ....., 190..

To .....

.....

.....

Commissioners of Highways of the Town of ....., ... County, N. Y.

No. 70.

Application for Commissioners on Laying Out, Altering or Discontinuing a Highway.

(§ 82, *ante.*)

COUNTY COURT — ..... County.

In the Matter
of the
Application of ....., to Lay Out (*or*, alter, *or* discontinue) a Highway in the Town of ....., ... County, N. Y., and the Assessment of Damages Therefor.

To the County Court of ..... County, N. Y.:

The petition of ....., respectfully shows:

1. That he (resides in,) owns property in and is assessable for highway labor in the town of ....., ... county, N. Y.

2. That on the .... day of ....., 190.., he presented an application in writing to the commissioners of highways of said town of which the following is a copy: (*Insert a copy of the application to the commissioners.*)

3. That said application was made in good faith; that the commissioners of highways have not laid out (*or*, altered *or*, discontinued) said highway but that they refuse so to do. That your petitioner presents herewith the undertaking required by section 83 of the Highway Law.

WHEREFORE, your petitioner prays that three commissioners be appointed pursuant to section 84 of the Highway Law, to determine the necessity of such highway proposed to be laid out (*or*, altered — *or*, the uselessness of the highway proposed to be discontinued), and to assess the damages by reason of the laying out

and opening (*or*, the altering *or*, the discontinuing) of such highway.

Dated ....., 190..

[*Signature of Applicant.*]

.....

Attorney for Applicant,

....., *N. Y.*

No. 71.

Verification of Same.

STATE OF NEW YORK,)
COUNTY OF ..... } *ss.:*
TOWN OF .....)

....., being duly sworn, says that he is the applicant named in the foregoing petition, that he has read the same and knows the contents thereof, that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

.....

Subscribed and sworn to before me this
.... day of ....., 190..

.....

Notary Public.

No. 72.

Undertaking for Costs, Etc.

(§ 83, *ante.*)

[*Entitle as in preceding form.*]

WHEREAS, the undersigned ..... is about to make application to the ..... County Court for the appointment of commissioners to determine upon the necessity of a certain proposed highway (*or as may be*) in said town and to assess the damages therefor.

Now, THEREFORE, the said ....., as principal, and ..... (*and* .....), as surety

(*or* sureties) do hereby jointly and severally undertake that if the commissioners appointed determine that the proposed highway (*or* alteration) is not necessary (*or*, that the highway proposed to be discontinued is not useless) we will pay to the commissioners their compensation at the rate of four dollars for each day necessarily spent, and all costs and expenses necessarily incurred in the performance of their duties, which amount shall not exceed the sum of fifty dollars.

Witness our hands and seals this ... day of ....., 190..

..... [L. S.]
..... [L. S.]
(*Signatures and seals.*)

(*For acknowledgment, justification and approval by the county judge, see Forms Nos.* 3, 4 *and* 5, ante.)

No. 73.

Order Appointing Commissioners.
(§ 84, *ante.*)

At a ..... term of the County Court of the County of ....., held in and for the said county at the county court house in the ..... of ....., on the .... day of ....., 190..

Present — Hon. ...., County Judge.

COUNTY COURT — ..... County.

In the Matter
of the
Application of ....., to Lay Out (*or*, alter *or*, discontinue) a Highway in the Town of ....., ... County, N. Y., and the Assessment of Damages Therefor.

On reading and filing the petition of ....., of the town of ....., in said county, verified the .... day of ....., 190.., praying for the appointment of three com-

missioners, pursuant to section 84 of the Highway Law, to certify as to the necessity of laying out and opening (*or* altering, *or* discontinuing) a highway, beginning (*insert the description as in the application*), and to assess the damages by reason of laying out and opening (*or* altering, *or* discontinuing) such highway. And upon reading and filing proof of due service of notice of this application upon the (several) commissioner(s) of highways of said town of ....., together with copies of said petition, and upon reading and filing (*enumerate all other motion papers*) and upon approving and filing the undertaking required by section 83 of the Highway Law, and after hearing ....., attorney of said petitioner and ..... in opposition, and due deliberation having been had, now on motion of said ...., attorney for said petitioner, it is

ORDERED, That ....., ..., and ....., three disinterested freeholders of the town of ....., in said county, be and they hereby are appointed such commissioners; they to take such steps and proceedings as are required or authorized by law.

.....

.....*County Judge.*

No. 74.

Notice of Appointment.

[*Entitle as in preceding form.*]

Take notice that you, and each of you, were, by and order of the County Court of ..... county, a copy of which is hereto annexed, on the .... day of ....., 190.., appointed commissioners as therein set forth, and you are hereby required to take the constitutional oath of office and fix a time and place at which you will all meet to hear the commissioners of the highways of the town of ....., ... county, N. Y., and all other persons interested in the highway mentioned in said order.

Dated this ..... day of ....., 190...

(*Signature.*)

(*Adapt constitutional oath of office from Form No.* 8, ante, *omitting portion between* **.)

No. 75.

Appointment of Meeting of Commissioners.

(§ 84, *ante.*)

[*Entitle as in preceding form.*]

An order having been made herein by this court on the .... day of ....., appointing the undersigned commissioners to determine upon the necessity of laying out (*or, as may be*) a certain highway in the said town of ....., described in the petition herein and assess the damages by reason of the laying out and opening (*or, as may be*) thereof and the undersigned having duly taken the constitutional oath of office, do hereby appoint the .... day of ....., 190.., at .... o'clock in the .....noon at the ..... of ..... (*e. g.*, the hotel of one .....) in said town as the time and place at which they will meet and hear the commissioners of highways of the town where such (proposed) highway is situated and others interested therein and take such other action as is authorized by law.

Dated this ..... day of ....., 190...

.....
.....
.....

Commissioners.

No. 76.

Notice of Meeting of Commissioners.

(§ 85, *ante.*)

COUNTY COURT —..... County.

In the Matter of the Application of ....., to Lay Out (*or*, alter; *or*, discontinue) a Highway in the Town of ....., ... County, N. Y., and the Assessment of Damages Therefor.

Notice is hereby given that the undersigned has made application to the commissioners of highways of the town of .....,

..... county, N. Y., for the laying out and opening (*or,* the altering; *or,* the discontinuing) of a highway in said town, as follows: (*here insert description as in the application*) which proposed highway (*or,* alteration) will pass (*or,* passes) through the lands of (*name as in petition*), and that by an order of the ..... County Court, dated the .... day of ....., 190.., ..., ... and ..... were appointed commissioners to determine and certify as to the necessity of said proposed highway (*or,* alteration; *or,* discontinuance), and to assess the damages by reason of the laying out and opening (*or,* the alteration; *or,* the discontinuance) of such highway; and that said commissioners have taken the constitutional oath of office and will meet on the .... day of ....., 190.., at .... o'clock in the .....noon, at ....., in said town, the same being the time and place duly appointed by them therefor, to examine the proposed highway (*or,* the highway) and hear the commissioners of highways of said town of ....., and all others interested therein, and to assess the damages if such highway (*or,* alteration) be determined to be necessary (*or,* useless); (*if petition is for laying out a road, add:* and will also, if they determine that the proposed highway is necessary, estimate the probable cost of laying out and completing the same as required by section 86 of the Highway Law).

(*Signature.*)

To:

.....,
.....,
.....

(*Address to all owners and occupants.*)

No. 77.

Proof of Posting and Service of Foregoing Notice.

(§ 85, *ante.*)

STATE OF NEW YORK,
COUNTY OF ..... } *ss.:*
TOWN OF .....

....., being duly sworn, says that he is over twenty-one years of age, and that he posted up notices in writing

of which the within is a copy, at ....., ..., and ....., three public places in the town of ....., in said county, on the .... day of ....., 190.., and that he served a like notice upon each of the following named persons at the time and place set opposite their respective names, as follows:

..... on ....., 190.., at ....., N. Y.

..... on ....., 190.., at ....., N. Y.

(*name all the owners and occupants of the lands through which the highway is proposed to be laid out, altered, or discontinued*) by delivering to and leaving with each of them a true copy thereof (*or*, by leaving the same at his residence with a person of mature age, to wit, his wife) and (if any were served by mail, add: upon the following persons by depositing the same in the post office at ....., N. Y., properly enclosed in a securely closed postpaid wrapper, addressed to them respectively, as follows:

To ....., at ....., N. Y.; to ....., at ....., N. Y. (*etc.*); those being their respective post office addresses, and they not residing in said town of ..... And deponent personally knew all of said persons to be the same persons to whom said notice was addressed and to be respectively all the owners and occupants of the lands through which such highway is to be laid out (*or as may be*).

.....

Subscribed and sworn to before me this
.... day of ....., 190...

.....

Notary Public (or as may be).

No. 78.

Subpoena to Attend Before Commissioners.

(§ 84, *ante*.)

[*Entitle as in Form No.* 76.]

The People of the State of New York, to ..... *and* .....:

You and each of you are hereby commanded to be and appear before us, commissioners appointed by the County Court of

..... county, at the ....., in the town of ....., on the .... day of 190.., at .... o'clock in the .....noon, to testify and give evidence in the matter of laying out (altering *or* discontinuing) a highway, and assessing the damages therefor, in the town of ....., then and there to be heard and determined.

Dated this .... day of ....., 190...

.....
.....
.....
Commissioners.

No. 79.

Oath of Witness.

(§ 84, *ante.*)

You do solemnly swear that the evidence you shall give touching the necessity of laying out (altering *or* discontinuing) the highway in question, and assesssing the damages therefor, shall be the truth, the whole truth, and nothing but the truth, so help you God.

No. 80.

Certificate of Commissioners in Favor of Application.

(§§ 86, 87, *ante.*)

COUNTY COURT — ..... County.

In the Matter of the Application of ....., to Lay Out (*or*, alter; *or*, discontinue) a Highway in the Town of ....., ... County, N. Y., and the Assessment of Damages Therefor.

The undersigned having been by an order of the County Court of ..... county, N. Y., dated the .... day of ....., 190.., made on the application of ....., appointed

commissioners (*together with one* .....) to determine upon the necessity of the laying out and opening (*or,* the altering; *or* the discontinuing) of a highway in the town of ....., in said county, as follows (*describe highway as in application*): which proposed highway (*or,* highway) will cross (*or* crosses) the lands of (*name the persons as in application*), and to assess the damages to be caused thereby; having taken the constitutional oath of office, and having determined upon and given due notice of the time and place at which we would meet, and all having met at ....., in said town on the .... day of ....., 190.., pursuant to such notice, and on proof of the due service and posting of the notices by the applicant, pursuant to section 85 of the Highway Law, and having examined the highway proposed (to be discontinued, *or,* the alterations proposed), and the lands through which it is proposed to be laid out and opened (*or,* altered; *or,* discontinued), and the following persons appearing by their attorneys, to wit, ... by....., his attorney (*note all appearances*), and having heard all the evidence and allegations of the commissioners of highways of said town and the parties interested therein, and the evidence of all the witnesses produced and the arguments of counsel;

NOW, THEREFORE, We, the said commissioners (*or,* a majority of said commissioners, due notice of the time and place of this meeting having been given to all), do thereupon certify, decide, determine and order that * it is necessary that the highway be laid out and opened (*or,* altered; *or* discontinued), pursuant to the said application of ....., dated the .... day of ....., 190.. (except that a slight variation therefrom should be made as follows: *describe variation briefly and give reasons therefor*); and the following is a survey of said road as we determine and certify it is necessary that it be laid out and opened (*here insert a survey so accurate that from it alone the road can be laid out*). Said road (*or,* alteration) will pass (*or,* passes) through the lands of (*name persons*). And we have assessed the damages required to be assessed by reason of laying out and opening (*or* altering; *or,* discontinuing) such highway as follows:

The damages of ....., at $.....; the damages of ....., at $.....; and the (net) damages of ....., at $.....

(*If petition is for laying out a highway, add:* The probable cost of laying out and completing said highway would be, in our opinion, based upon the evidence given before us upon the hearings $.....)

Done in duplicate this ..... day of ....., 190...

.....

....

.....

Commissioners (or, *A Majority of Said Commissioners*).

No. 81.

Same Denying Application.

(§ 88, *ante.*)

[*Entitle as in form No.* 80.]

(*As in No. ...., to the * and continue*) the proposed highway (*or,* alteration) is not necessary (*or,* that the highway proposed to be discontinued is not useless).

Done in duplicate and dated this .... day of ....., 190...

.....

.....

.....

Commissioners (or, *A Majority of Said Commissioners*).

(*Indorse with memorandum of costs and expenses of commissioners.*)

No. 82.

Notice of Motion to Confirm, Vacate or Modify Decision.

(§ 89, *ante.*)

[*Entitle as in form No.* 80.]

Please take notice that upon the decision of the commissioners herein dated ....., 190.., a copy of which is herewith (*or,* on ....., 190.., was by me) served upon you, and

upon the minutes and evidence of said commissioners filed in ..... county clerk's office, ..., 190.., and upon the order of this court dated ....., 190.., appointing said commissioners and upon (*here state all other moving papers*) and upon this notice of motion and proof of service hereof, an application will be made to this court at a ..... term thereof, to be held at the court house in the ..... of ....., on the .... day of ....., 190.., for an order confirming (*or,* vacating; *or,* modifying in the following particulars, *stating them*) the said decision of the commissioners in the above entitled matter, with costs, and for such other and further relief as to the court may seem proper.

Dated this .... day of ....., 190...

.....

Attorney for .....,

(*Address, etc.*)

To

.....,

.....,

.....

(*Adverse parties.*)

No. 83.

Order Confirming, Vacating or Modifying Decision.

(§ 89, *ante.*)

At a ..... term of the ..... County Court, held in and for said county, at the county court house, in the ..... of ....., on the .... day of ....., 190...

Present, Hon. ....., ... County Judge.

[*Entitle as in form No.* 80.]

On reading and filing the decision of ....., ... and ....., the commissioners in the above-entitled matter, dated the ..... day of ....., 190.., by which it appears (*state substance of decision*), and upon reading and filing (*enumerate all other papers used upon the motion*), together with

proof of due service of notice of this motion and (*enumerate other papers*) upon ..... and ....., and after hearing ....., of counsel for ....., and ....., of counsel for ....., opposed, and, after due deliberation, it is, on motion of said .....,

ORDERED, That the said decision be, and the same is hereby confirmed — *or,* vacated and another hearing be had before the same (*or, other*) commissioners, to wit: *name them;* — *or,* modified as follows (*state particulars of modification*); with $..... costs to ..... to be paid by .....

.....

..... *County Judge.*

No. 84.

Certificate of Commissioners of Highways on Decision.

(§§ 81, 98, *ante.*)

[*Entitle as in form No.* 80.]

WHEREAS, ..., did present to us, as commissioners of highways of the town of ....., ... county, N. Y., a written application dated the ..... day of ....., 190.., to lay out a highway in said town, and which we refused (*or,* failed) to grant; and,

WHEREAS, Commissioners were duly appointed by the County Court of said county, pursuant to section 84 of the Highway Law; and, after having duly met and performed the several duties imposed by law upon them, certified that such proposed highway was necessary and proper, and should be laid out and opened, and assessed the damages therefor and duly made their certificates to that effect, and the said court having confirmed the decision of said commissioners (*or,* no motion having been made to the County Court to confirm, vacate or modify such decision within thirty days after it was filed in the town clerk's office), which said applications and all other papers, orders and certificates were duly filed in the offices of the town clerk of said town and the county clerk of said county, respectively, as required by law, to which papers reference is here made;

NOW, THEREFORE, We, the undersigned commissioners of highways of said town, at a meeting duly called and held for such purpose and pursuant to the statute, do hereby lay out such highway so applied for and as ordered, whereof a survey has been made, as follows: Beginning (*here insert survey so definite that from it alone the highway may be located*), and the line of such survey shall be the center of the highway, which is to be ..... rods in width, and passes through lands of ....., ... and .....

Witness our hands this ..... day of ....., 190...

.....
.....
.....
Commissioners of Highways.

No. 85.

Consent to Laying Out Highway through Orchard, Etc.
(§ 90, *ante.*)

WHEREAS, ... has made application in writing to the commissioners of highways of the town of ....., ... county, N. Y., dated the ..... day of ....., 190.., to lay out a highway in said town, beginning at (*insert description*), and which said highway will pass through my orchard of the growth of four years (*or,* garden; *or,* barn; *or,* dooryard; *or as the case may be*);

NOW, THEREFORE, I do hereby consent that such highway be so laid out, opened, worked, and used through my said orchard (*or as the case may be*), but this consent shall not be construed as a waiver or release of my claim for damages by reason thereof (*or, damages may be agreed upon*).

Dated this ..... day of ....., 190...

(*Signature of Owner.*)

(*Add acknowledgment as in form No.* 3, ante.)

(*For forms of order, etc., laying out a highway on consent, see Nos.* 64-67, *and for forms upon contest, see Nos.* 68-84.)

No. 86.

Certificate as to Highway To Be Laid Out through Orchard, Etc.
(§ 90, *ante*.)

COUNTY COURT — ..... County.

In the Matter
of the
Application of ....., to Lay Out a Highway in the Town of ....., ... County, N. Y., and the Assessment of Damages Therefor.

To the County Court of ..... County, N. Y.:

The undersigned commissioners of highways of the town of ....., in said county, hereby certify that on the ..... day of ....., 190..., ..., who is assessable for highway labor in said town, made a written application to us, as such commissioners, to lay out a highway in said town, passing through an orchard of ....., of the growth of four years or more (*or as the case may be*), pursuant to the Highway Law, as follows (*insert a copy of the application*).

That the said ..... (*owner*) does not consent thereto. That the following proceedings were had upon such application (*insert a history of the proceedings up to and including the filing of decision of the commissioners appointed by the court*). We further certify that the public interest will be greatly promoted by the laying out and opening of such highway through said orchard (*or as may be*); and that the commissioners appointed by this court have certified that such highway is necessary and proper, and have assessed the damages of all parties by reason thereof as follows: ....., at $....., etc.

Dated the ..... day of ....., 190...

.....
.....
.....
Commissioners of Highways.

(*Serve copy of this certificate, with notice of motion, eight days before hearing,* § 90, ante; *adapt notice of motion from form No.* 82, ante.)

No. 87.

Order to Lay Out a Highway through Orchard, Etc.
(§ 90, *ante.*)

At a ..... Term of the ..... County Court, held in and for said County at the County Court House, in the City of ....., on the ..... day of ....., 190...

Present — Hon. ....., County Judge.

[*Entitle as in form No.* 86.]

Upon reading and filing the certificate of ....., ... and ....., commissioners of highways of the town of ....., ... county, N. Y., stating (*give substance of certificate*), and upon reading the following papers (*name all motion papers*), together with proof of due service of notice of this motion and (*copies of all papers served*), and after hearing ....., of counsel for the applicant, and ....., of counsel for ....., opposed, and due deliberation having been had, it is, upon motion of said .....

ORDERED, That the said highway described in the application herein be laid out pursuant to said application as follows (*insert description of highway*).

FURTHER ORDERED, That $..... costs be paid to ..... by .....

.....
..... *County Judge.*

No. 88.

Order of Appellate Division to Lay Out Highway through Orchard, Etc.
(§ 90, *ante.*)

At a Term of the Appellate Division of the Supreme Court in the ..... Judicial Department, held at the ..... in the City of ....., on the ..... day of ....., 190...

Present — Hon. ....., *Presiding Justice.*
Hon. ....., *Justice.*
Hon. ....., *Justice* (*etc.*).

[*Entitle as in form No.* 86.]

....., ... and ....., as commissioners of highways of the town of ....., ... county N. Y.,

having presented to us an order of the ..... County Court bearing date the ..... day of ....., 190.., adjudging and determining that a highway be laid out in said town through the orchard of ....., of the growth of four years or more (*or, as the case may be*), pursuant to the Highway Law, with the certificate and proofs upon which said order was granted, duly certified by such court, with proof of due service of notice of this motion on the said ....., and ....., and after hearing ....., of counsel of the applicant, and ....., of counsel for ....., opposed, it is hereby

ORDERED, ADJUDGED AND DECREED, That the said order of said County Court be, and the same hereby is, in all things unanimously confirmed, with $..... costs of this motion to ....., to be paid by .....

Dated this ..... day of ....., 190...

.....

Clerk.

No. 89.

Certificate of Commissioners of Highways on Foregoing Orders.

(§§ 81, 90, 98, *ante.*)

[*Entitle as in form No.* 86.]

WHEREAS, ..., did, on the ..... day of ....., 190.., present to us, as commissioners of highways of the town of ....., ... county, N. Y., a written application to lay out a highway in said town, passing through an orchard of ....., of the growth of four years or more (*or, as may be*), and such proceedings having been had thereon, pursuant to the Highway Law, that the County Court of said county has ordered said highway to be laid out and opened, which said order has been duly confirmed by the Appellate Division of the Supreme Court, in the ..... Judicial Department, which said application, certificates and all other papers in said proceedings are duly filed in the offices of the town clerk of said town and the county clerk of said county, respectively, as required by law, to which reference is here made.

NOW, THEREFORE, We, the undersigned commissioners of highways, pursuant to the Highway Law, do hereby lay out said highway so applied for and as ordered, whereof a survey has been made, as follows: Beginning (*insert survey so definite that from it alone the highway may be located*), and the line of survey is to be the center of the highway, which is to be ..... rods in width.

Witness our hands this ..... day of ....., 190...

.....
.....
.....
Commissioners of Highways.

No. 90.

Notice of Meeting, When Officers of Different Towns Disagree About a Highway.

(§ 94, *ante.*)

You will please take notice that the undersigned, who are commissioners of highways for the town of ....., ... county, N. Y., will meet at ....., in said town, on the ..... day of ....., 190.., at .... o'clock in the ....noon, for the purpose of determining upon our differences, viz. (*stating them*), in relation to the laying out of a new highway (*or*, the altering of a highway), extending into (*or*, upon the boundary line between) the town (*or*, city; *or*, village) of ....., ... county, N. Y., and the town (*or*, city; *or*, village) of ....., ... county, N. Y., described as follows (*insert description of new highway or alteration*).

Dated this ..... day of ....., 190...

.....
.....
.....
Commissioners of Highways.

To ....., ... and .....,
Commissioners of Highways of the Town of .....,
(or as may be).

No. 91.

Certificate of Disagreement.

(§ 94, *ante.*)

COUNTY (*or, Supreme*) COURT —..... County.

In the Matter

of the

Application of ....., to Lay Out (*or*, alter) a Highway Extending into (*or* upon the boundary line between) the Town (*or*, city; *or*, village) of ....., ... County, N. Y., and the Town (*or*, city; *or*, village) of ....., ... County, N. Y., and the Assessment of Damages Therefor.

To the County Court of ..... County, (or, To the Supreme Court of) New York:

We, the undersigned commissioners of highways of the town of ....., ... county, N. Y., do hereby certify that on the ..... day of ....., 190.., ..., who is liable to be assessed for highway labor in the town of ....., made a written application to us, as such commissioners, to lay out (*or,* alter) a highway extending into (*or, as the case may be*) the town (*or,* city; *or,* village) of ....., ... county, N. Y., and the town (*or,* city; *or,* village) of ....., in the county of ....., N. Y. That the highway commissioners of said towns (*or,* of the said town, and the officers of the said city [*or,* village], having the powers of commissioners of highways in the same county), cannot agree as to the necessity of such highway (*or,* alteration) or the terms upon which the same shall be laid out (*or,* made), after having duly met to adjust and determine upon their differences.

WHEREFORE, We ask that three commissioners be appointed, pursuant to section 94 of the Highway Law, to decide upon said matters.

Dated this ..... day of ....., 190...

.....

.....

.....

Commissioners of Highways.

(*Add verification as in form No.* 15.)

No. 92.

Order Appointing Commissioners on the Foregoing Certificate.

(§ 94, *ante.*)

At a ..... Term of the County Court of the County of ....., held in and for said County (*or.* At a Special Term of the Supreme Court, held in and for the ..... Judicial District), at ....., in the ..... of ....., on the ..... day of ....., 190...

Present — Hon. ....., ... County Judge (*or,* Justice of the Supreme Court).

[*Entitle as in form No.* 91.]

On reading and filing the certificates of ....., ... and ....., highway commissioners of the town of ....., ... county, N. Y. (and of the highway commissioners *or as may be* of the ....., ... county, N. Y.), dated the .... day of ....., 190.., stating (*here state substance of facts in the certificates*), and upon reading and filing the (*enumerate all motion papers*), and after hearing ....., of counsel for ....., and ....., of counsel for ....., opposed, it is hereby

ORDERED, That ....., ... and ....., of the town of ....., ... county, N. Y., be, and they

are hereby appointed commissioners to determine upon the necessity of laying out (*or,* altering) such highway and adjust the terms upon which such highway shall be laid out (*or,* altered), and appraise the damages therefor, and, subject to the approval of the court, decide all questions that shall arise upon the hearing, and take such other action and perform such duties as are prescribed in section 94 of the Highway Law.

.....

.....*County Judge* (*or, Justice of Supreme Court*).

(*For notice of appointment, oath of office, appointment of meeting, subpoena and oath of witnesses, etc., see forms Nos.* 74-79.)

No. 93.

Decision of Commissioners.

(§ 94, *ante.*)

[*Entitle as in Form No.* 91.]

The undersigned, having been by an order of the County Court of ..... county (*or,* the Supreme Court of the State of New York), dated the ..... day of ....., 190.., appointed commissioners to certify as to the necessity of laying out (*or,* altering) a highway extending into the town (*or,* city; *or,* village) of ....., ... county, N. Y., and the town (*or,* city; *or,* village) of ....., ... county, N. Y., and described as follows: (*insert description*) and to adjust the terms upon which the same shall be laid out, etc.

NOW, THEREFORE, We, the said commissioners, having taken the constitutional oath of office, and having determined upon a time and place of meeting, and having given due notice of the time and place at which we would meet, and all having met at ....., in the town of ....., on the .... day of ....., 190.., pursuant to such notice, and on proof of service of due notice thereof, viz., ... days' notice upon the ..... (*name all officials and persons interested*), and having viewed the proposed highway (*or,* proposed alteration of a highway) and

the lands through which it is proposed to be laid out (*or,* altered), and having heard all the evidence of the commissioners of highways and the parties interested therein, and the evidence of all the witnesses produced, and all evidence we deemed proper, and the arguments of counsel, do thereupon decide, determine and certify that it is necessary and proper that the highway be laid out (*or,* altered) as follows: (*Describe highway or alteration.*)

And we have ascertained and appraised the damages to the individual owners or occupants of land through which such new (*or,* altered) highway will pass by reason of the laying out and opening (*or,* altering) of such highway as follows:

The damages of ....., at $.....; the damages of ....., at $....., all to be paid by the town of .....; and the damages of ....., at $....., to be paid by the town of .....

Witness our hands this ..... day of ....., 190...

.....

.....

.....

Commissioners.

(*Forms for proceedings to confirm, vacate or modify the commissioners' report and to lay out the highway may be readily adapted from forms Nos.* 82-84, ante. *Upon laying out a highway upon the boundary line of towns, the order of the commissioners of highways should divide it into two or more highway districts,* § 97.)

No. 94.

Differences About Improvements.

(§ 95, *ante.*)

[*Adapt forms for these proceedings from Nos.* 90-93, *given for proceedings under* § 94.]

No. 95.

Description of Highway Abandoned.

(§ 99, *ante.*)

We, the undersigned commissioners of highways of the town of ....., ... county, N. Y., hereby certify, at a meeting thereof duly called and held for that purpose, that the following highway has not been traveled or used as a highway for six years (last past, *or,* has not been opened and worked within six years, *etc.; or, as the case may be, under* § 99, ante), and is no longer used as a public highway: (*insert accurate description*) and, pursuant to section 99 of the Highway Law, the same is discontinued.

Witness our hands this ..... day of ....., 190...

.....
.....
.....

Commissioners of Highways.

No. 96.

Order to Open Highway by Use.

(§ 100, *ante.*)

To ....., as Overseer of Highways in Highway District No. ....., of the Town of ....., ... County, N. Y.:

WHEREAS, The following described land has been used by the public as a highway for a period of (more than) twenty years: (*Insert accurate description*), and has become a highway, with the same force and effect as if it had been duly laid out and recorded as a highway;

THEREFORE, The undersigned commissioners of highways of said town order you to open such highway to the width of two rods (*or more*).

Witness our hands this ..... day of ....., 190...

.....
.....
.....

Commissioners of Highways.

No. 97.

Notice to Remove Fences.

(§ 101, *ante.*)

To ..... (*owner or occupant*):

WHEREAS, The undersigned, commissioners of highways of the town of ....., ... county, N. Y., have, in conformity with the Highway Law, laid out a highway, by an order dated ....., 190.., and duly filed, which said road passes through inclosed (*or,* cultivated; *or,* improved) lands, owned (*or,* occupied) by you, and is described as follows (*insert description*).

NOW, THEREFORE, You will please take notice that you are required to remove your fences from within the bounds of said highway, within sixty days after service hereof, in default whereof we shall cause them to be removed and direct said highway to be opened and worked.

Dated at said town this ..... day of ....., 190...

.....
.....
.....

Commissioners of Highways.

No. 98.

Notice to Remove Fallen Trees.

(Id., § 103.)

To ..... *occupant of, etc.:*

Please take notice that a tree has fallen (*or as may be*) from the inclosed land occupied by you in the town of ....., ... county, N. Y., viz., your orchard (*or as may be*), into the highway known as the ..... road, at (*state where*), and you are hereby notified to remove the same within two days after the service of this notice; and that if you fail to remove it within such time, you will forfeit the sum of fifty cents for every day thereafter until it shall be removed.

Dated this ..... day of ....., 190...

.....

No. 99.

Order by Commissioners as to Encroachment Upon Highway.
(§ 105, *ante.*)

At a meeting of the commissioners of highways of the town of ....., ... county, N. Y., at ....., in said town, all the commissioners having met and deliberated on the subject embraced in this order, and having ascertained that the public highway in said town, leading from ..... to ....., is encroached upon and obstructed on the ..... side thereof, along the lands in the occupation of ....., by a fence, which forms part of the inclosure of said land through which the highway leading from ..... to ..... (*or otherwise describe it*) has been laid out (*or as may be*), which said fence has not been removed, although due notice to remove same has been given according to law, and, having caused the said highway to be surveyed, and, having ascertained the true bounds and limits thereof on that side to be upon the following line (*here insert the survey of the line over which the encroachment is made*), we do now determine that the strip of land which lies between the said fence and the line above described is a part of the public highway aforesaid, and that so much of said fence as is (north) of said line is an encroachment upon said highway; therefore,

IT IS ORDERED, By the commissioners of highways of said town that the said fence be removed so that the highway may be open and unobstructed.

Witness our hands at said town this ..... day of ....., 190...

.....
.....
.....
Commissioners of Highways.

No. 100.

Order by Commissioners as to Obstructions.
(§ 105, *ante.*)

[*Adapt from the foregoing order.*]

No. 101.

Notice to Remove Obstruction or Encroachment.

(Id., § 105.)

To .....:

You are hereby notified by the undersigned commissioners of highways of the town of ....., ... county, N. Y., that they have determined by an order, a copy of which is hereby annexed and made a part hereof, that the highway in Highway District No. ..... in said town, adjoining land owned (*or,* occupied) by you (*state where*) and known as the ..... road, has been and is encroached upon (*or,* obstructed) as follows: A fence erected by you and forming a part of the inclosure of your said land encroaches, etc. (*continue the description of the encroachment or obstruction, giving notice so precise and explicit as to enable the person upon whom it is served to fix the place and extent thereof without doubt or uncertainty, and, if possible, attach a survey showing the conditions complained of*); and you are hereby directed to remove the same within (*not more than sixty*) days after the service of this notice; and that, if you fail so to do, you become liable to the penalty and costs of removal or the relief prescribed by section 105 of the Highway Law.

Witness our hands this ..... day of ....., 190...

.....
.....
.....
Commissioners of Highways.

No. 102.

Application to Lay Out Private Road.

(§ 106, *ante.*)

To ....., ... *and* ....., *Commissioners of Highways of the Town of* ....., ... *County, N. Y.:*

The undersigned, who resides in and who is liable to be assessed for highway labor in your town, hereby makes application to you

to lay out a private road for his use and benefit, beginning (*insert description, specifying its width and location, courses and distances*), and said proposed road will run through the land of ....., occupied by ..... (*etc.*).

Dated this ..... day of ....., 190...

(*Signature.*)

No. 103.

Notice of Selecting Jury to Determine Necessity of Road.

(§ 107, *ante.*)

In the Matter of the Application of ..... for a Private Road in the Town of ....., ... County, N. Y.

....., of the town of ....., ..., county, N. Y., having made a written application to us, the undersigned, as commissioners of highways of said town, to lay out a private road for his use and benefit in said town, a copy of which is hereto attached, you are hereby notified that a jury will be selected at the (*designate the place*) in said town, on the ..... day of ....., 190.., at ..... o'clock in the .....noon, for the purpose of determining upon the necessity of such road, and to assess the damages by reason of the opening thereof.

Dated this ..... day of ....., 190...

.....

.....

.....

Commissioners of Highways.

To ....., ... and ..... (*name all owners and occupants*).

No. 104.

Affidavit of Service of Notice.

(§ 109, *ante*.)

[*Entitle as in form No.* 103.]

STATE OF NEW YORK,
COUNTY OF ..... } *ss.:*
TOWN OF .....

....., being duly sworn, says that he is twenty-one years of age; that on the ..... day of ....., 190.., he served the application and the notice hereto attached, which were received by the applicant herein ....., 190.., on ....., ... and ....., residents of said town, by delivering to and leaving with each of them copies of the same; on ..... and ....., residents of, but then absent from said town, by leaving a copy thereof at the residence of each of them; on ..... and ....., non-residents of said town, by depositing in the post-office a copy thereof to each, properly inclosed in an envelope and addressed to them, respectively, at their post-office addresses, and paying the postage thereon; on ....., an infant owner and resident of said town, by delivering to him and to ....., his father (*or,* mother; *or,* guardian), a copy thereof; on ....., an infant owner and resident of said town, but absent therefrom, by leaving a copy of the same at his residence and delivering a copy thereof to his father (*or as may be*); and on ....., an infant owner and non-resident of said town, by depositing in the post-office copies thereof, addressed to him and his father (*or,* mother; *or,* guardian), each properly inclosed in an envelope and addressed to them, respectively, at their post-office addresses, and paying the postage thereon. Deponent further says that he knew each of the persons so served as aforesaid to be the same persons to whom the said notice is addressed.

.....

Subscribed and sworn to before me this
..... day of ....., 190...

.....
Notary Public.

No. 105.

Summoning Jury.

(§ 112, *ante.*)

In the Matter
of the
Application of ....., for a Private Road in the Town of ....., ... County, N. Y.

To ....., ..., ..., ..., ...
and ..... (*insert the names of the six jurors selected*):

You are hereby summoned and required to appear at the ....., in said town of ....., on the ..... day of ....., 190.., at ..... o'clock in the .....noon, the same being a convenient time and place designated by me for you to meet, to form a jury of freeholders to determine as to the necessity of laying out a private road through the lands of ....., and to assess the amount of damages sustained by reason of the opening thereof, if it is determined to open the same.

Dated this ..... day of ....., 190...

.....
.....
.....
Commissioners of Highways.

No. 106.

Oath of Jurors.

(§ 113, *ante.*)

You do solemnly swear, in the presence of the ever-living God (*or,* affirm) that you will well and truly determine as to the necessity of a private road across the lands of ....., as has been applied for by ....., and that you will well and truly assess the damages by reason of the opening of such road.

No. 107.

Oath of Witnesses.

You do solemnly swear (*or,* affirm) that the evidence you shall give, touching the necessity of laying out the private road as applied for by ....., and the damages to be sustained by the opening thereof, shall be the truth, the whole truth, and nothing but the truth, so help you God.

No. 108.

Verdict of Jury.

(§ 114, *ante.*)

In the Matter
of the
Application of ....., for a Private Road in the Town of ....., ... County, N. Y.

We, the undersigned, being six disinterested resident freeholders of the said town of ....., having met pursuant to due notice, on the ..... day of ....., 190.., at ....., in said town, and having been duly sworn, well and truly to determine as to the necessity of the private road described in the application of ....., a copy of which is hereto attached, and the damages occasioned by the opening thereof, and having viewed the premises through which it is proposed to be laid out, and having heard the allegations of the parties and all witnesses produced by them and the evidence produced, do hereby determine and certify that it is necessary and proper to lay out a private road for the use and benefit of ....., pursuant to his said application, as follows (*insert description*), and we deter-

mine and assess the said damages of ..... at $....., and of ..... at $.....

Dated this ..... day of ....., 190...

.....
.....
.....
.....
.....
.....

Jurors.

(*For proceedings upon verdict, see forms Nos.* 82-83.)

No. 109.

Order of Highway Commissioners Laying Out Private Road.

(§§ 81, 116, *ante.*)

WHEREAS, ... did present to us, as commissioners of highways of the town of ....., ... county, N. Y., a written application to lay out a private road in said town for his use and benefit, hereinafter described; and due proceedings being had, and six disinterested freeholders having met, after due notice to the owners and occupants of the lands through which said road is proposed to be laid, and, after viewing said lands and hearing the allegations of the parties and witnesses produced, certified that said road is necessary and proper, and assessed the damages to be caused by the opening thereof, which certificate and verdict bears date the .... day of ....., 190.., and was duly filed and recorded, with said application, in the office of the town clerk of said town; and,

WHEREAS, No motion has been made to the County Court to confirm, vacate or modify said decision (*or as the case may be*);

NOW, THEREFORE, We, the undersigned commissioners of highways of said town, at a meeting duly called and held for that purpose, pursuant to the Highway Law, do hereby lay out said private road as so applied for and certified to, whereof a survey has been

made as follows (*here insert survey*), and the line of survey is to be the center of the road, which is to be ..... rods in width.

Witness our hands this ..... day of ....., 190...

.....
.....
.....
Commissioners of Highways.

No. 110.

Statement to the Supervisor of the Expenses of Bridges.
(Id., § 132.)

To ....., *Esq., Supervisor of the Town of* .....,
..... *County, N. Y.:*

We, the undersigned commissioners of highways of the town of ....., ... county, N. Y., pursuant to section 132 of the Highway Law, hereby render a statement of the expenses incurred by us in the erection (*or,* repair, *or* both) of the free public bridges of said town, with description thereof, as follows (*give a description of each free bridge and an itemized account of the expenses incurred on the same*).

Dated this ..... day of ....., 190...

.....
.....
.....
Commissioners of Highways.

STATE OF NEW YORK,
COUNTY OF ..... } *ss.:*
TOWN OF .....

....., being duly sworn, says that he is one of the commissioners of highways of said town, and that the foregoing statement, which is subscribed by him, is in all respects true and correct.

.....

Subscribed and sworn to before me this
..... day of ....., 190...

.....
Notary Public (or as may be).

No. 111.

Notice to Commissioners of Adjoining Towns.

(§ 135, *ante.*)

To the Commissioners of Highways of the Town of .....,
..... County, N. Y.:

YOU WILL PLEASE TAKE NOTICE, That the bridge known as the ..... bridge, the same being a bridge constructed over a stream upon the boundary of your said town and our town, and for the construction and repair of which said towns are jointly liable, is in need of repairs in the following respects (stating them; *or,* of rebuilding), and you are notified to within twenty days after service hereof on you give your consent in writing to repair (*or,* rebuild) the same, and to, within a reasonable time thereafter, do the same, in default whereof we shall proceed as authorized by the Highway Law in such cases.

Dated this .... day of ....., 190...

.....
.....
.....

Commissioners of Highways of the Town of ....., ... County, N. Y.

No. 112.

Consent to Repair or Rebuild Bridge.

(§ 135, *ante.*)

To the Commissioners of Highways of the Town of .....,
..... County, N. Y.:

In compliance with your notice served on us, dated the ..... day of ....., 190.., and pursuant to section 135 of the Highway Law, we, the undersigned commissioners of highways of the town of ....., ... county, N. Y., hereby consent to join with you in repairing (*or*, rebuilding) the bridge mentioned in your said notice.

Dated this ..... day of ....., 190...

.....
.....
.....

Commissioners of Highways.

No. 113.

Petition of Freeholders to Commissioners of Adjoining Towns.

(§ 136, *ante.*)

STATE OF NEW YORK,
COUNTY OF
TOWN OF ..... } *ss.:*

To ....., ... *and* ....., *Commissioners of Highways of the Town of* ....., ... *County, N. Y., and* ....., ... *and* ....., *Commissioners of Highways of the Town of* ....., ... *County, N. Y.:*

We, the undersigned, ..., ... and ....., do respectfully petition and apply to you, pursuant to section 136 of the Highway Law, and show that we are severally freeholders of the said town of ....., and that the bridge known as (*here designate the bridge*), which crosses the (*name the stream*), a stream forming the boundary line between said towns of ..... and ....., has become and is out of repair (*state in what respects*); that said bridge is required to be repaired and maintained by the joint expense of said towns, and said towns are jointly liable to make and maintain a bridge at said point.

And we hereby petition and apply to you, the said commissioners, to rebuild (*or,* repair) the bridge at said point.

Dated this ..... day of ....., 190...

(*Signatures.*)

(*Verification as in Form No.* 15.)

No. 114.

Refusal to Repair, Etc.

(§ 136, *ante.*)

To ....., ... *and* ....., *Freeholders of the Town of* .....:

We, the undersigned commissioners of highways of the towns of ..... and ....., ...

county, N. Y., having been duly served with your petition, bearing date the ..... day of ....., 190.., relating to the (*designate bridge*) on the (*designate stream*), do hereby refuse to rebuild (*or,* repair) said bridge for want of funds (*or as the case may be*).

Dated this ..... day of ....., 190...

.....
.....
.....

Commissioners of Highways of the Town of .....

.....
.....
.....

Commissioners of Highways of the Town of .....

No. 115.

Notice of Motion.
(§ 136, *ante*.)

SUPREME COURT —..... County.

In the Matter
of the
Application of ....., ... and ....., Certain Freeholders of the Town of ....., ... County, N. Y., for an Order Requiring the Commissioners of Highways of the Towns of ..... and ..... to Rebuild (*or*, repair) a Joint Bridge Known as the ..... Bridge.

YOU WILL PLEASE TAKE NOTICE, That on the affidavits (*and other papers*), copies of which are herewith served on you, and

upon our application, served upon you ....., 190.., and upon proof of service thereof and upon your refusal, an application will be made to this court, at a Special Term thereof, to be held at the court house, in the ..... of ....., on the ..... day of ....., 190.., at the opening of the court on that day, or as soon thereafter as counsel can be heard, for an order requiring you, the said commissioners, to rebuild (*or*, repair) the bridge mentioned in the affidavit hereto attached, and requiring money to be appropriated or raised therefor, and for such other and further relief as to the court may see just, with costs of this motion.

Dated this ..... day of ....., 190...

(*Signature.*)

To .....

.....

and .....

Commissioners of Highways of the
Town of ....., ... County, N. Y.

To .....

.....

and .....

Commissioners of Highways of the
Town of ....., ... County, N. Y.

No. 116.

Affidavit for Order to Rebuild or Repair Bridge.

(§ 136, *ante.*)

[*Entitle as in preceding form.*]

STATE OF NEW YORK,
COUNTY OF ..... } ss.:
TOWN OF .....

....., ... and ....., being duly severally sworn, say, each for himself, that he is a freeholder in the town

of ....., ... county, N. Y.; that said town joins the town of ....., ... county, and the (*name the stream*) forms the boundary line between said towns; that at (*describe where*) a bridge has been maintained at the joint expense of said towns, and said towns are jointly liable for the building, rebuilding, repairs and maintenance of such bridge; that such bridge is (*describe the bridge*) and it has become, and is in want of repair (*or,* rebuilding) for the following reasons (*describe fully the condition the bridge is in*); that on the ..... day of ....., 190.., the above-named affiants united in a petition to ....., ... and ....., commissioners of highways of the said town of ....., and ....., ... and ....., commissioners of highways of the said town of ....., pursuant to section 136 of the Highway Law, which petition was as follows (*insert it*), and was duly served on each of said commissioners; that thereafter and on the ..... day of ....., 190.., said commissioners served on us a written refusal as follows (*here set forth the refusal*); that in our opinion the bridge should be repaired (*or as may be*), and that the expense should be between $..... and $.....

.....

.....

.....

Severally subscribed and sworn to before me
this .... day of ....., 190..

.....

Notary Public.

(*The foregoing affidavit should be as full as possible to avoid the necessity of a reference for failure to show the material facts.*)

No. 117.

Order of the Court to Rebuild Bridge.

At a Special Term of the Supreme Court, held in and for the ..... Judicial District, at the Court House in the ..... of ....., on the .... day of ....., 190...

Present — Hon. ....., *Supreme Court Justice.*

[*Entitle as in preceding form.*]

On reading and filing the affidavit of ....., ... and ....., verified the ..... day of ....., 190.., setting forth that (*here set forth the substantial facts of the affidavit*), and upon reading and filing the application therein mentioned, with proof of due service of said application, and a copy of said affidavit and notice of this motion upon each of the commissioners of highways of said towns, and after hearing ....., of counsel for said applicants, in favor of said motion, and ....., of counsel for the said commissioners, opposed, it is hereby ordered, pursuant to section 136 of the Highway Law, that said commissioners build (*or,* repair) the said bridge at (*here describe the place*), at the joint expense of said towns, not to exceed $....., and that (*one-half*) of the said expenses shall be chargeable to the said town of ..... and (*one-half*) thereof to the said town of .....

.....

(*The following directions and forms are taken from the instructions of the State Engineer and Surveyor and should be carefully followed in all proceedings of this nature*):

No. 118.

Petitions, Resolutions, etc., for Improvement Under "Good Roads Law."
(L. 1898, ch. 115, L. 1901, ch. 240, *ante.*)

In order that the provisions of the law providing for the preliminary steps to be taken for the improvement of highways by

State aid, may be fully complied with, and for the convenience of petitioners for such improvement and the boards of supervisors presenting resolution, I append hereto blank forms covering this subject.

Form "A" is the petition to be presented by property owners to the board of supervisors asking for improvement of the highway.

Form "B" is the resolution to be adopted by the board of supervisors in cases where property owners present petitions to the board asking for such improvement.

Form "C" is the resolution to be adopted by the board of supervisors in cases where *no* petition is presented by the property owners.

Form "D" is the final resolution to be adopted by the board of supervisors upon presentation of plans, specifications and estimate of cost of the proposed work, whether said work is called for by petition of property owners, or upon resolution of the board of supervisors only.

The resolution covered by Form "E" should also be adopted at the same time that the resolution covered by Form "D" is adopted, providing the improvement is undertaken upon a resolution of the board of supervisors only.

The resolution covered by Form "F" should be adopted in connection with Form "D" in cases where the improvement is called for by petition of the property owners.

In some cases it is necessary to procure a right of way, in which case the resolution covered by Form "G" should also be adopted by the board of supervisors in connection with the resolution covered by Form "D."

It is suggested that the above forms be carefully followed in all cases, thus facilitating the progress of the various steps preliminary to the prosecution of the work. Especial care should be used in describing the road covered by the petition, giving its length, termini, town within which located, etc.

"A."

FORM TO BE USED IN PETITION FOR THE IMPROVEMENT OF HIGHWAYS TO BE PRESENTED TO THE BOARD OF SUPERVISORS BY A MAJORITY OF THE PROPERTY OWNERS.

To the Honorable the Board of Supervisors of ..... County:

The undersigned respectfully represent:

First, That they are the owners of a majority of lineal feet of real estate fronting on the following public highway, within the county of ....., town of ....., and described as follows: .....
.....
.....
.....
being a distance of about ..... miles.

Said road above described being known as the .....
..... road.

Second, Believing that public interest demands the improvement of that section of said highway, described as follows: .....
.....

We respectfully petition your honorable body to pass the necessary resolution, requesting that such highway be improved under the provisions of chapter 115 of the Laws of 1898.

NAME OF PROPERTY OWNERS.	FRONTAGE IN LINEAL FEET ON PROPERTY DESCRIBED.
(*Write names here.*)	(*Number of feet here.*)

CERTIFICATE.

This certifies that I have examined the annexed petition, and have compared the names of the signers thereto, with the description of the property as shown upon the assessment-rolls of said town of ....., county of ....., N. Y., for the year ....., and I do hereby certify that the persons signing the

annexed petition, are the owners of a majority of the lineal feet fronting on that part of ..... road in the town of ..... referred to and described in the annexed petition.

Dated .....

Witness to signature,

.....

....., *Town Clerk of the Town of .....*, *County of .....*, *N. Y.*

.....

"B."

FORM OF RESOLUTION TO BE ADOPTED BY THE BOARD OF SUPERVISORS IN CASES WHERE PETITION IS MADE BY THE PROPERTY OWNERS FOR THE IMPROVEMENT OF HIGHWAY.

WHEREAS, On the ..... day of ....., 19..., there was duly presented to this board, pursuant to sections 1 and 2 of chapter 115 of the Laws of 1898, a petition from the property owners of a majority of the lineal feet fronting on the section of a certain highway, situate within the county of ....., and which section is herein described, setting forth that the petitioners are such owners, and asking that said section of the highway be improved, under the provisions of the act referred to; and,

WHEREAS, Such description does not include any portion of the highway within the boundaries of any city or incorporated village; therefore,

Resolved, That public interest demands the improvement under the provisions of chapter 115 of the Laws of 1898, of the section of that public highway situate in the town of ....., county of ....., and described as follows: .....

.....

being a distance of about ..... miles.

Resolved, That the clerk of this board is hereby directed to forthwith transmit a certified copy of the foregoing resolution to the State Engineer and Surveyor.

STATE OF NEW YORK,
..... COUNTY.
OFFICE OF THE CLERK OF THE BOARD OF SUPERVISORS. } ss.:

This is to certify that I, ..., clerk of the board of supervisors of the county of ....., have compared the foregoing resolution with the original resolution now on file in this office, and which was passed by the board of supervisors of said county of ....., on the ..... day of ....., and that the same is a correct and true transcript of such original resolution and the whole thereof.

In Witness Whereof, I have hereunto set my hand and the official seal of the board of supervisors, this .... day of ....., 19....

.....,
Clerk of the Board of Supervisors
of ..... County.

"C."

FORM OF RESOLUTION TO BE ADOPTED BY THE BOARD OF SUPERVISORS WHERE NO PETITION IS PRESENTED BY THE PROPERTY OWNERS.

WHEREAS, At a meeting of the board of supervisors of ..... county, N. Y., held in the ..... of ....., on the ..... day of ....., 19..., a quorum being present and a majority voting in the affirmative, the following resolution was adopted:

Resolved, That public interest demands the improvements under the provisions of chapter 115 of the Laws of 1898, of that section of public highway situate within the town of ....., county of ....., and described as follows: .....
.....
being a distance of about ..... miles.

The above description does not include any portion of a highway within the boundaries of any city or incorporated village.

Resolved, That the clerk of this board is hereby directed to forthwith transmit a certified copy of the foregoing resolution to the State Engineer and Surveyor.

STATE OF NEW YORK,
..... COUNTY.
OFFICE OF THE CLERK OF THE BOARD OF SUPERVISORS. } *ss.:*

This is to certify that I, ... clerk of the board of supervisors of the said county of ....., have compared the foregoing copy of resolution with the original resolution now on file in the office, and which was passed by the board of supervisors of said county of ....., on the .... day of....., 19..., and that the same is a correct and true transcript of such original resolution and the whole thereof.

In Witness Whereof, I have hereunto set my hand and the official seal of said board of supervisors this .... day of ....., 19...

....,
Clerk of the Board of Supervisors
of the County of .....

"D."

FORM OF FINAL RESOLUTION TO BE ADOPTED BY THE BOARD OF SUPERVISORS APPROVING AND ADOPTING THE PLANS, SPECIFICATIONS AND ESTIMATE OF COST OF THE PROPOSED IMPROVEMENT AFTER SAME HAVE BEEN PRESENTED BY THE STATE ENGINEER AND SURVEYOR.

1. WHEREAS, At a meeting of this board, held on the ..... day of ....., 19.., a resolution was adopted that provision should be made for the improvement of that portion of the highway commonly known as ....., and described as follows:
.....
.....

in accordance with the provisions of chapter 115 of the Laws of 1898; and,

2. WHEREAS, The State Engineer and Surveyor has investigated and determined that a section of said highway is of sufficient public importance for improvement in accordance with the provisions of said chapter 115, and has certified his approval of the said resolution; and,

3. WHEREAS, Said State Engineer and Surveyor has caused a section of said highway, which section is described as follows:

.....

.....

to be surveyed and mapped, and has caused plans and specifications and an estimate of cost to be made for said improvement, and has transmitted the same to this board;

4. *Resolved,* That the highway above described in paragraph one, be improved and constructed in that portion thereof above described in paragraph three in accordance with the maps, plans, specifications and estimate prepared for such improvement by the State Engineer and Surveyor under the provisions of chapter 115 of the Laws of 1898. That said work be done under the charge, care and superintendence of the State Engineer and Surveyor, and that said maps, plans, specifications and estimate prepared by said State Engineer and Surveyor for said work, are hereby duly approved and adopted by this board.

5. *Resolved,* That the treasurer of the county of ..... is hereby authorized and directed to pay upon the requisition or draft of the State Engineer and Surveyor the sum of ..... dollars ($.....), being one-half of the estimated expense, which amounts to $....., for improving and constructing in accordance with the provisions of chapter 115, Laws of 1898, the section of ..... road as described in paragraph three, from any unappropriated funds in his hands; and if he should find it necessary, he is instructed and directed to issue the note of the county for such a sum as is necessary to meet such requisition or draft, and

said sum is hereby made available, subject to the draft of the State Engineer and Surveyor.

I hereby certify that the above is a true copy of the resolution passed by the board of supervisors of ..... county, at a meeting held on the ..... day of ....., 19...

....,

Clerk of the Board of Supervisors.

(*Attach seal here.*)

"E."

FORM OF RESOLUTION TO BE ADOPTED BY THE BOARD OF SUPERVISORS IN CONNECTION WITH FORM "D," IN CASES WHERE THE IMPROVEMENT OF HIGHWAY HAS BEEN UNDERTAKEN UPON A RESOLUTION OF THE BOARD OF SUPERVISORS ONLY, AND NOT UPON THE PETITION OF THE ADJACENT PROPERTY OWNERS.

Resolved, That of the total estimated cost of said improvement, amounting to $....., thirty-five per cent. thereof, amounting to $....., shall be paid by the county of ....., and said thirty-five per cent. ($.....), together with the accumulated interest thereon, shall be inserted in the general tax levy for the year .....; and that fifteen per cent. of said total, amounting to $....., shall be paid by the town of ....., and said fifteen per cent. ($.....), together with the accumulated interest thereon, will be added to the amount of tax to be raised in said town of ..... in the levy of .....

I hereby certify that the above is a true copy of the resolution passed by the board of supervisors of ..... county, at a meeting held on the ..... day of ....., 19...

....,

Clerk.

(*Attach seal.*)

"F."

FORM OF RESOLUTION TO BE PASSED BY THE BOARD OF SUPERVISORS IN CONNECTION WITH FORM "D," IN CASES WHERE THE IMPROVEMENT OF HIGHWAY HAS BEEN UNDERTAKEN UPON THE PETITION OF THE PROPERTY OWNERS AND THE RESOLUTION OF THE BOARD OF SUPERVISORS ONLY.

Resolved, That of the total estimated cost of said improvement, amounting to $....., thirty-five per cent. thereof, amounting to $....., shall be paid by the county of ....., and said thirty-five per cent. ($.....), together with the accumulated interest thereon, shall be inserted in the general tax levy for the year .....; and that fifteen per cent. of said total, amounting to $....., shall be assessed upon and paid by the owners of the lands benefited by said improvement, to the extent and in the manner provided by the provisions of chapter 115, Laws of 1898, relating thereto.

I hereby certify that the above is a true copy of the resolution passed by the board of supervisors of ..... county, at a meeting held on the ..... day of ....., 19...

....., *Clerk.*

(*Attach seal.*)

"G."

FORM OF RESOLUTION TO BE ADOPTED BY THE BOARD OF SUPERVISORS PROVIDING FOR ACQUISITION OF THE RIGHT OF WAY. THIS RESOLUTION TO BE PASSED (WHERE NECESSARY), IN CONNECTION WITH THE RESOLUTION ADOPTING PLANS, SPECIFICATIONS AND ESTIMATE SUBMITTED BY THE STATE ENGINEER AND SURVEYOR, IN FORM "D."

Resolved, That the chairman of this board appoint a committee of three, which committee is hereby authorized to secure the requisite right of way (*or as may be*) for the section of the ..... road in the town of ....., county of ....., N. Y., which is to be improved in accordance with the provisions of chapter 115, Laws of 1898, and 240, Laws of 1901, as amended. That said committee is

authorized to obtain said right of way (*or as may be*), either by dedication or legal proceedings, as may be necessary, in order that said right of way shall conform to the boundaries of the section of said ..... road as laid out in the maps and plans prepared for the improvement of said road under the direction of the State Engineer and Surveyor, wherever the boundaries of the proposed new section of said road deviate from the present boundaries and cross the present section of the existing highway.

The said committee are directed to procure such right of way at the earliest time practicable, and as soon as the same is secured, the committee shall report to the clerk of the board of supervisors, who shall notify the State Engineer and Surveyor in writing; this notice shall be considered proof that the board of supervisors have complied with paragraph 7 of chapter 115 of the Laws of 1898.

I hereby certify that the above is a true copy of the resolution passed by the board of supervisors of ..... county, at a meeting held on the ..... day of ....., 19...

....., *Clerk.*

(*Attach seal.*)

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[Attention is again particularly directed to the numerous cross references to be found upon many of the pages indicated in the index.]

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